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In The Supreme Court of the United States

MICHAEL H. HIRSCH,

Petitioner,

v.

DEPARTMENT OF AGRICULTURE,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR WRIT OF CERTIORARI WITH APPENDIX

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QUESTIONS PRESENTED

Whether, upon the evidentiary record below, the agency interpretation of the regulatory statute in issue provided a proper basis for the revocation of the license of Kleiman & Hochberg, Inc. ("K&H") under the Perishable Agricultural Commodities Act (the "PACA") and a proper and valid predicate to the imposition of statutory employment sanctions upon Petitioner.

The question should be answered in the negative.

Whether, upon the Record below, the imposition of statutory employment sanctions upon the Petitioner before the Court comports with Constitutional standards for protection of Petitioner's liberty interests under the Fifth Amendment to the Constitution.

The question should be answered in the negative.

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PETITION FOR WRIT OF CERTIORARI

Michael H. Hirsch petitions for a writ of certiorari to review an opinion and judgment of the U. S. Court of Appeals for the District of Columbia.

OPINIONS BELOW

The opinion of the U.S. Court of Appeals for the District of Columbia, dated August 14, 2007, is officially reported at *Kleiman & Hochberg, Inc. v. U. S. Dept. of Agriculture*, 497 F.3d 681 (CADC 2007), and is reproduced at App. 1a-26a.

The Decision and Order of the USDA's Judicial Officer, the final agency authority, is reproduced at App. 42a-109a, and the USDA Judicial Officer's opinion denying reconsideration is reproduced at App. 27a-41a. The opinion of the USDA's Chief Administrative Law Judge ("ALJ") is reproduced at App. 110a-151a. The Orders of United States Court of Appeals for the District of Columbia Circuit denying Petitioner's requests for Rehearing and Rehearing *En Banc* are reproduced at App. 152a and 154a respectively.

JURISDICTION

The Petition is timely under 28 U.S.C. § 2101(c) and Supreme Court Rule 13.3 because it is being filed within 90 days from denial of a petition for rehearing dated November 6, 2007. The Court has jurisdiction to review the judgment of the U. S. Court of Appeals for the District of Columbia Circuit pursuant to 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

The relevant statutory provisions involved are 7 U.S.C. § 499a(b)(9), § 499b, § 499h, and § 499n(b) of the PACA. The relevant statutory provisions are reproduced as follows:

Section 499a(b)[portion] of the PACA - Definitions

(9) The term "responsibly connected" means affiliated or connected with a commission merchant, dealer, or broker as (A) partner in a partnership, or (B) officer, director, or holder of more than 10 per centum of the outstanding stock of a corporation or association. A person shall not be deemed to be responsibly connected if the person demonstrates by a preponderance of the evidence that the person was not actively involved in the activities resulting in a violation of this chapter and that the person either was only nominally a partner, officer, director, or shareholder of a violating licensee or entity subject to license or was not an owner of a violating licensee or entity subject to license which was the alter ego of its owners.

Section 499b of the PACA - Unfair Conduct

It shall be unlawful in or in connection with any transaction in interstate or foreign commerce:

(1) For any commission merchant, dealer, or broker to engage in or use any unfair, unreasonable, discriminatory, or deceptive practice in connection with the weighing, counting, or in any way determining the quantity of any perishable

agricultural commodity received, bought, sold, shipped, or handled in interstate or foreign commerce.

(2) For any dealer to reject or fail to deliver in accordance with the terms of the contract without reasonable cause any perishable agricultural commodity bought or sold or contracted to be bought, sold, or consigned in interstate or foreign commerce by such dealer.

(3) For any commission merchant to discard, dump, or destroy without reasonable cause, any perishable agricultural commodity received by such commission merchant in interstate or foreign commerce.

(4) For any commission merchant, dealer, or broker to make, for a fraudulent purpose, any false or misleading statement in connection with any transaction involving any perishable agricultural commodity which is received in interstate or foreign commerce by such commission merchant, or bought or sold, or contracted to be bought, sold, or consigned, in such commerce by such dealer, or the purchase or sale of which in such commerce is negotiated by such broker; or to fail or refuse truly and correctly to account and make full payment promptly in respect of any transaction in any such commodity to the person with whom such transaction is had; or to fail, without reasonable cause, to perform any specification or duty, express or implied, arising out of any undertaking in connection with any such transaction; or to fail to maintain the trust as required under section 499e(c)

of this title. However, this paragraph shall not be considered to make the good faith offer, solicitation, payment, or receipt of collateral fees and expenses, in and of itself, unlawful under this chapter.

(5) For any commission merchant, dealer, or broker to misrepresent by word, act, mark, stencil, label, statement, or deed, the character, kind, grade, quality, quantity, size, pack, weight, condition, degree of maturity, or State, country, or region of origin of any perishable agricultural commodity received, shipped, sold, or offered to be sold in interstate or foreign commerce. However, any commission merchant, dealer, or broker who has violated - (A) any provision of this paragraph may, with the consent of the Secretary, admit the violation or violations; or (B) any provision of this paragraph relating to a misrepresentation by mark, stencil, or label shall be permitted by the Secretary to admit the violation or violations if such violation or violations are not repeated or flagrant; and pay, in the case of a violation under either clause (A) or (B) of this paragraph, a monetary penalty not to exceed $2,000 in lieu of a formal proceeding for the suspension or revocation of license, any payment so made to be deposited into the Treasury of the United States as miscellaneous receipts. A person other than the first licensee handling misbranded perishable agricultural commodities shall not be held liable for a violation of this paragraph by reason of the conduct of another if the person did not have knowledge of the violation or lacked the ability to correct the violation.

(6) For any commission merchant, dealer, or broker, for a fraudulent purpose, to remove, alter, or tamper with any card, stencil, stamp, tag, or other notice placed upon any container or railroad car containing any perishable agricultural commodity, if such card, stencil, stamp, tag, or other notice contains a certificate or statement under authority of any Federal or State inspector or in compliance with any Federal or State law or regulation as to the grade or quality of the commodity contained in such container or railroad car or the State or country in which such commodity was produced.

(7) For any commission merchant, dealer or broker, without the consent of an inspector, to make, cause, or permit to be made any change by way of substitution or otherwise in the contents of a load or lot of any perishable agricultural commodity after it has been officially inspected for grading and certification, but this shall not prohibit re-sorting and discarding inferior produce.

Section 499h of the PACA - Grounds for Suspension and Revocation of License

(a) Authority of Secretary

Whenever (1) the Secretary determines, as provided in section 499f of this title, that any commission merchant, dealer, or broker has violated any of the provisions of section 499b of this title, or (2) any commission merchant, dealer, or broker has been found guilty in a Federal court of having violated section 499n(b) of this title, the Secretary may publish the facts and circumstances of such

violation and/or, by order, suspend the license of such offender for a period not to exceed ninety days, except that, if the violation is flagrant or repeated, the Secretary may, by order, revoke the license of the offender.

(b) Unlawful employment of certain persons; restrictions; bond assuring compliance; approval of employment without bond; change in amount of bond; payment of increased amount; penalties

Except with the approval of the Secretary, no licensee shall employ any person, or any person who is or has been responsibly connected with any person -

(1) whose license has been revoked or is currently suspended by order of the Secretary;

(2) who has been found after notice and opportunity for hearing to have committed any flagrant or repeated violation of section 499b of this title, but this provision shall not apply to any case in which the license of the person found to have committed such violation was suspended and the suspension period has expired or is not in effect; or

(3) against whom there is an unpaid reparation award issued within two years, subject to his right of appeal under section 499g(c) of this title.

The Secretary may approve such employment at any time following nonpayment of a reparation award, or after one year following the revocation or finding of flagrant or repeated violation of section

499b of this title, if the licensee furnishes and maintains a surety bond in form and amount satisfactory to the Secretary as assurance that such licensee's business will be conducted in accordance with this chapter and that the licensee will pay all reparation awards, subject to its right of appeal under section 499g(c) of this title, which may be issued against it in connection with transactions occurring within four years following the approval. The Secretary may approve employment without a surety bond after the expiration of two years from the effective date of the applicable disciplinary order. The Secretary, based on changes in the nature and volume of business conducted by the licensee, may require an increase or authorize a reduction in the amount of the bond. A licensee who is notified by the Secretary to provide a bond in an increased amount shall do so within a reasonable time to be specified by the Secretary, and if the licensee fails to do so the approval of employment shall automatically terminate. The Secretary may, after thirty days notice and an opportunity for a hearing, suspend or revoke the license of any licensee who, after the date given in such notice, continues to employ any person in violation of this section. The Secretary may extend the period of employment sanction as to a responsibly connected person for an additional one-year period upon the determination that the person has been unlawfully employed as provided in this subsection.

Section 499n(b) of the PACA - Inspection of Perishable Agricultural Commodities

(a) [Omitted]

(b) Issuance of Fraudulent Certificates; Penalties

Whoever shall falsely make, issue, alter, forge, or counterfeit, or cause or procure to be falsely made, issued, altered, forged, or counterfeited, or willingly aid, cause, procure or assist in, or be a party to the false making, issuing, altering, forging, or counterfeiting of any certificate of inspection issued under authority of this chapter, sections 491, 493 to 497 of this title, or any Act making appropriations for the Department of Agriculture; or shall utter or publish as true or cause to be uttered or published as true any such false, forged, altered, or counterfeited certificate, for a fraudulent purpose, shall be guilty of a misdemeanor and upon conviction shall be punished by a fine of not more than $500 or by imprisonment for a period of not more than one year, or both, at the discretion of the court.

STATEMENT OF THE CASE

This case arises out of an interpretation of the PACA, a Federal statute that has, since 1930, regulated the marketing of produce in the United States. The underlying facts of the case are not in dispute. K&H, Petitioner's company, was respondent in a proceeding brought on by the USDA to revoke the company's license to operate in the interstate produce industry because of its alleged involvement in bribery of a federal produce inspector

in the Hunts Point Market in Bronx, NY. The allegations arose out of a joint USDA/FBI investigation and "sting" operation conducted in 1998 and 1999 into corruption in the USDA Inspections office located in said market. The background of the investigation and subsequent criminal prosecutions are set forth in the decision of the U. S. Court of Appeals for the Second Circuit in the case of *G&T Terminal Packaging v. Dep't of Agri.*, 468 F.3d 86 at 89 (2d Cir. 2006).

The facts concerning K&H and the 12 produce inspections and transactions which formed the basis of the administrative complaint are well stated in the findings in the original decision of Chief ALJ Marc R. Hillson, dated December 3, 2004, included in the Appendix at 110a through 151a.

Notably there has never been a finding of fact at any stage of this case that a single inspection performed at K&H was ever falsified by any inspector, including the one who testified at the evidentiary hearing below. In fact, the finding of the hearing judge was that the inspections forming the basis of the administrative complaint were not falsified and were accurate. [Hillson, J., Finding No 7, App. 129a] While Mr. John Thomas, a roughly 31% stockholder and officer of K&H , pled guilty to bribery of a public official for the stated purpose of obtaining "expedited inspections", there was no evidence presented that any particular inspection performed at K&H was, in fact, expedited or performed out of the normal order of inspections performed in the Hunts Point Market.

Petitioner was unquestionably a 31% stockholder of K&H and the company's President during the period when Thomas made his illegal payments to the inspectors. Petitioner was not involved in Thomas' bribery and the evidence at the evidentiary hearing established that, notwithstanding Petitioner's position with the licensed company, he neither knew nor should have known of Thomas' actions. [Hillson, J., Finding No. 12, App. 130a].

The Chief ALJ found that because of Thomas' actions in making illegal payments to produce inspectors, that K&H had violated the PACA. However, he also determined that the Thomas payments did not result in K&H dealing "unfairly" with its suppliers, and instead of license revocation, he imposed a civil penalty of $180,000. [Hillson, J. App. 148a]

The Chief ALJ's decision was appealed by the Department to the Judicial Officer, the final agency authority. The Judicial Officer adopted the Chief ALJ's findings and conclusions, except changed the imposed sanction to license revocation upon the premise that K&H failed to perform a new "implied duty" to refrain from bribing USDA produce inspectors. [Jensen, J. App. 96a]

Petitioner and K&H sought reconsideration of the Judicial Officer's decision of license revocation, maintaining that since neither the inspections nor K&H's dealings with its suppliers and customers were effected by Thomas' criminal payments, there could be no violation of the Unfair Conduct code of 7

U.S.C. § 499b, and since the evidence established that there was no way for Petitioner or the company to discover the activities even with the utmost management and oversight, it was incorrect to revoke the company's PACA license and improper to subject Petitioner to employment sanctions for the actions of another which he could neither discover nor prevent. The Judicial Officer denied Petitioner's reconsideration request [App. 27a-41a], and the case was appealed to the U.S. Court of Appeals for the D.C Circuit.

On the petition for review to the Court of Appeals, the court denied the review holding that the Judicial officer's interpretation of the implied duty was proper under *Chevron USA, Inc. v. Natural Res. Def. Council.*, 467 U.S. 837 (1984) because the implied duty clause of § 499b(4) was ambiguous and the Agency's interpretation of the clause as encompassing the new duty was reasonable. The Circuit also held that imposition of employment sanctions under § 499h(b) upon Petitioner was proper because the language of § 499a(b)(9) was rational in furtherance of a legitimate governmental objective.

REASONS FOR GRANTING THE PETITION

I. THE BASIC PREMISE UPON WHICH K&H'S PACA LICENSE WAS REVOKED WAS FLAWED AND SHOULD NOT FORM THE BASIS FOR EMPLOYMENT SANCTIONS AGAINST PETITIONER

The Judicial Officer based his revocation of the K&H PACA license upon his creation of a new "implied" duty encompassed within § 499b(4). The Circuit Court misinterpreted appellate counsel's statement at oral argument that there was an *"express duty"* in the PACA not to bribe public officials or officers such as produce inspectors. The Court mistook counsel's statement as a concurrence with the basic premise of a violation by K&H of the Unfair Conduct code of the PACA based upon Thomas' criminal conviction alone. Under the circumstances of the record of this case the payments by Thomas were crimes under 18 U.S.C. § 201(b)(1)(A). But the presence of criminal activity does not, without more, make the same conduct a violation of the PACA's Unfair Conduct code in § 499(b)(4). If it did, then no hearing to revoke K&H's license would have been needed because Thomas' guilty plea would have been sufficient grounds for the revocation.

Moreover, in § 499n(b) Congress made tampering with the inspection process a specific crime and particular grounds for license revocation in § 499h(a). Having specifically treated the issue of obtaining falsified inspections under the cited provision, there is no basis to infer that Congress

also implied such a duty in § 499b(4). The exhaustive list of ways of "obtaining" falsified inspections in § 499n(b) clearly encompasses bribing the inspecting officer. But Congress tied the crime (and the grounds for license revocation) directly to falsification of the inspection and/or alteration of the resulting certificate. Under the plain language of the statute, bribery of the inspector, while still a crime under Title 18, is not a violation of the PACA unless the bribery actually resulted in an inspection proven to be falsified. For the purposes of revocation of K&H's PACA license, it was the Government's burden to show that the inspections done by the corrupt inspectors at K&H were actually falsified as the result of Thomas' payments. The Record in this case establishes no such fact with respect to a single inspection; not one. Indeed, the great weight of the evidence was that the inspections were not falsified, and the Chief ALJ's Findings to that effect have never been questioned.

In fact, the evidentiary record of the case fails to show that Thomas' payments had any effect whatsoever on the inspections performed at K&H. While Thomas did plead guilty to paying for the purpose of obtaining "expedited" inspections, there is no factual basis in the Record for the Circuit's recitation and reliance on its prior decision in *Coosemans Specialties, Inc. v. Dept. of Agriculture*, 482 F.3d 560 (D.C. Cir. 2007) for the concept of K&H's "jumping the line" of companies waiting for inspections to the detriment of other merchants. There is not a shred of factual evidence, either documentary or by a witness with personal knowledge, in the Record of this case a) that K&H

ever actually got an improperly expedited inspection, or b) that any other merchant in the Hunts Point Market had an inspection delayed because a single inspection performed at K&H was done "out of turn." The Circuit's citation (and the Judicial Officer's reliance) upon such issues are misplaced, and unsupported by the evidentiary record of this case. What may have happened at *Coosemans* or any other case involving the Hunts Point Bribery Incident is irrelevant to what did or did not happen at K&H. Each case must rise or fall upon the record made in that particular case.

The Circuit's citations to *G&T Terminal Packaging Co. v. USDA*, 468 F.3d 86 (2d Cir. 2006) and its own decision in *Post & Taback, Inc. v. Dep't of Agric.*, 123 F. App'x 406 (D.C. Cir. 2005) are particularly inappropriate because in both of those cases, actual falsification and fraudulent use of the inspection certificates was proven, either at the administrative level as in *G&T* or at the criminal trial of the *Post* employee, Mark Alfisi. Both of such cases would and should have been decided the same way without recourse to making up a new "implied" duty in § 499b(4) since the evidence of violations of § 499n(b) were proven in each case beyond a reasonable doubt.

The Second Circuit in *G&T* and this D. C. Circuit in *Post & Taback* had no need to engage in the 2-step *Chevron* analysis because of vagueness in § 499b(4). Long before the events giving rise to these cases, Congress had already established the grounds for finding a violation of the PACA in connection with interference with and corrupting of the

commodity inspection process by licensees. The Legislative History of § 499d(b) (refusal of license) in connection with the 1962 amendment of the section shows that Congress has been dealing directly with the problem for many years. See *H.R. Rep. No. 1546, 87th Cong., 2d Sess. 8 (1962) reprinted at U.S. Code Cong. & Adm. News 1962, pg. 2752-53* where Congress removed prior violations of § 499n(b) as grounds for refusal of a PACA license because of the criminal penalties and other punitive measures already in place elsewhere. It is therefore manifest that corrupting of inspections was not some new issue confronting the Secretary such that he could not address the evil without a change in the law. His "tools" were well established and very effective. There is no vagueness in § 499n(b) nor in § 499h(a)(2), and the PACA is anything but silent on the issue of interference with the commodity inspection process. The PACA's message is loud, clear, and concise: "Falsify, alter, or obtain a falsified inspection certificate, and you go to jail. Do it repeatedly or flagrantly, and your license under the PACA will also be revoked."

Consequently, under *Chevron*, since the PACA is anything but vague on the question of whether and how corruption of the process of produce inspections constitutes a violation of the statute and warrants license revocation, the Secretary, through his Judicial officer, was not free to reinterpret § 499b(4) to find an implied duty that was never there because it was expressly dealt with in other sections of the statute. The D.C. Circuit has previously held that "under the *Chevron* two-step, we stop the music at step one if the Congress 'has directly spoken to

the precise question at issue' because we . . . and the agency . . . 'must give effect to unambiguously expressed intent.'" *Northpoint Tech., Ltd v. FCC*, 412 F.3d 145, 151 (D.C. Cir. 2005) (quoting *Chevron*, 467 U.S. at 842-43.

Congress made simple bribery of a public official, including a USDA produce inspector, a crime. It could have made simple bribery of that same inspector a violation of the PACA. It did not, and instead imposed the additional requirement that the resulting inspection be actually corrupted and falsified. It was the Government's burden to prove that the inspections done at K&H were actually corrupted. Unlike the proven facts in the *G&T Terminal* and *Post & Taback* cases, the Government failed to carry its burden of proof, and Petitioner and K&H actually proved the opposite.

Congress can certainly establish limitations on a person's rights to engage in the produce business. It could likewise establish a code of conduct and impose duties and obligations upon people who choose to enter the industry. That is the essence of Congress' power to regulate interstate commerce. But if Congress places a duty or obligation, by either negative proscription or positive prescription, upon PACA licensees and the people who operate them, there must be a means for those licensees (and the people who actually work under the regulatory scheme) to carry out those duties. A duty without a means to meet it is a duty in a vacuum. The Record in this case established that there was simply no means that could have been employed by Petitioner to discover and prevent

Thomas' actions. Holding Petitioner in violation of a duty impossible to fulfill is impermissible under any notion of fair play and substantial justice. No rational and honest person would subject themselves to such an arbitrary regulatory scheme, and no rational government, seeking to regulate rather than destroy an industry so vital to our nation's well being, would establish such a scheme.

Petitioner unquestionably met the statutory definition of a person "responsibly connected" with K&H, the PACA licensee. However, for purposes of imposing sanctions upon Petitioner, the rulings below with respect to K&H are inapplicable and insufficient to justify barring him from the only profession he knows.

II. IMPOSITION OF EMPLOYMENT RESTRICTIONS UPON PETITIONER ON THE RECORD OF THIS CASE IS OFFENSIVE TO HIS LIBERTY RIGHTS UNDER THE FIFTH AMENDMENT TO THE CONSTITUTION

When it amended § 499a(9) in 1995, Congress afforded individuals alleged to be responsibly connected with a PACA licensee the opportunity to show that they were not involved in the activity. However, if they held more than 10% of the corporation's stock or were an officer exercising any kind of managerial control, the first part of the "test" becomes useless because the old "per se" definition in the prior statute will still control.

The Circuit's decision below states the "petitioners do not claim that there is a fundamental right" at issue in this case [App. 19a]. In fact, Michael Hirsch's fundamental liberty right to engage in his chosen profession and occupation is on the line in this action. There is thus a very large difference between whether the PACA constitutionally provides a rational basis, through its regulation of Interstate Commerce, for limitation (or revocation) of K&H's "rights" to engage in the produce business, and the statutes' ability to take away Michael Hirsch's right to be employed in that same industry merely because he was unable to discover or control the actions of another (Thomas). It would be a very different situation if, as in *Zwick v. Freeman*, 373 F.2d 110 (2d Cir. 1967), cited by the Circuit, K&H's license were revoked because it failed to pay its suppliers as was the case with the Zwicks' prior company. There, the responsibly connected parties were in control of their company's financial affairs and therefore liable for its failures and violations of the statutory scheme. In the case at bar, there is no such easy principle to be applied to Michael Hirsch. While the Court might impute Thomas' illegal acts to the company, banning Michael from employment imputes those actions one step further and lays them on Michael's shoulders in order to punish him and take away his liberty right under the 5th Amendment even though he did nothing wrong, and could not discover, control or prevent the wrongs of others. The Court in *United States v. Carolene Products Co.*, 304 U.S. 779, 58 S. Ct. 778, 82 L. Ed. 1234 (1938), drew the careful distinction between economic regulation and infringement of personal liberties guaranteed under the 5th Amendment.

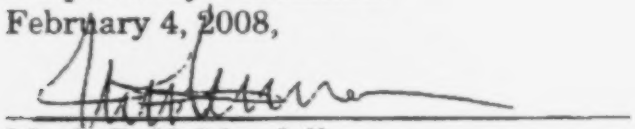
Petitioner is entitled to due process protection for his Liberty rights, which include the right to engage in any of the common occupations of life. See *Board of Regents v. Roth*, 408 U.S. 564, 572 (1972). Dealing in produce is certainly one of the common occupations of life which, though highly regulated under PACA, still must be afforded the requirements of due process prior to being stripped away or sanctioned by USDA. While rights to employment in a particular profession are not absolute and are subject to regulation, such regulation must not be arbitrary, *Nebbia v. People of State of New York*, 291 U.S. 502, 527-28 (1934).

Punishment of Michael Hirsch by banning him from the industry for the actions of others which he was not involved, and over which he had neither control nor the ability to discover is offensive to traditional notions of fair play and substantial justice.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully Submitted:
February 4, 2008,



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APPENDIX

ENTERED AUGUST 14, 2007

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued March 13, 2007 Decided August 14, 2007

No. 06-1283

KLEIMAN & HOCHBERG, INC., ET AL.,
PETITIONERS

v.

UNITED STATES DEPARTMENT OF AGRICULTURE,
RESPONDENT

On Petition for Review of an Order of the Department of Agriculture

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Mark C. H. Mandell argued the cause and filed the briefs for petitioners.

Leslie K. Lagomarcino, Senior Counsel, U.S. Department of Agriculture, argued the cause for respondent. With her on the brief were *James Michael Kelly*, Deputy General Counsel, and *Margaret M. Breinholt*, Assistant General Counsel.

Before: TATEL, GARLAND, and BROWN, *Circuit Judges*.

Opinion for the court filed by *Circuit Judge* GARLAND.

GARLAND, *Circuit Judge*: The petitioners in this case are Kleiman & Hochberg, Inc., a wholesale produce merchant, and its president, Michael Hirsch. The company's vice president pled guilty to bribing a federal produce inspector and later admitted that he had been making similar payments for more than a decade. After an administrative enforcement proceeding, the Secretary of Agriculture revoked the company's license to do business under the Perishable Agricultural Commodities Act. The same administrative decision triggered restrictions on Hirsch's ability to work in the produce industry. The petitioners now seek review of that decision. For the reasons explained below, we deny the petition for review.

I

Kleiman & Hochberg, Inc. (K&H) is a New York corporation operated out of the Hunts Point Terminal Market in the Bronx, New York. Since 1947, K&H has maintained a license to buy and sell produce in interstate commerce under the Perishable Agricultural Commodities Act (PACA), 7 U.S.C. § 499a *et seq*. During the period of time relevant to this case, K&H had three principals: Michael Hirsch, its president; Barry Hirsch, its treasurer and Michael's brother; and John Thomas, its vice president. Each man owned 31.6 percent of the corporation's outstanding stock.

Our recent opinion in *Coosemans Specialties, Inc. v. Department of Agriculture*, 482 F.3d 560 (D.C. Cir. 2007), which involved the bribery of the same federal inspector by a different company, sets forth the relevant background information regarding Hunts Point:

> The perishable produce that arrives at Hunts Point often travels some distance between the supplier and a buyer, such as [K&H]. As a result, produce may arrive in a condition worse than expected. If the buyer then asks for a price reduction, the [supplier] is at a disadvantage, because it has no way of knowing whether to trust the buyer's representations about the condition of the produce. The [United States Department of Agriculture's (USDA's)] inspection process is intended to level the playing field by providing the faraway [supplier] with an independent evaluation of the produce's condition so he can be assured that the price he receives is fair. A buyer, upon receipt of nonconforming goods, may request an inspection. [A USDA] inspector reviews the produce and issues an official certificate assessing its condition that can help the producer and buyer renegotiate the price. . . .
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> This inspection system has been subject to abuse. For two decades, corrupt USDA inspectors and buyers at Hunts Point participated in a scheme of illegal payments. An inspector who received a bribe might furnish a falsified certificate indicating that

> the produce's condition was worse than it actually was. The buyer would use that certificate to negotiate a lower price with the supplier. Once he paid the supplier, the buyer could resell the produce for a price that reflected the produce's actual condition. In this way, a buyer who bribed inspectors for this purpose could increase his profit margin to the detriment of the supplier. Additionally, some inspectors who had accepted bribes permitted those companies to jump to the front of the line for inspections, thereby delaying the inspections of their competitors. Produce being perishable, buyers who had to wait for inspections were likely to receive lower prices when the goods were eventually resold.
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> In 1999, one of the Hunts Point inspectors, William Cashin, was caught taking bribes. After his arrest, he agreed to cooperate with investigators. He conducted inspections from April until August 1999 while wearing audio and/or video recording devices to document the bribes he received.

Coosemans Specialties, 482 F.3d at 562-63. At the end of each day of work, Inspector Cashin met with agents of the FBI and the USDA's Office of Inspector General to turn over bribe money and describe the particulars of the bribes he received that day.

Cashin later testified that he received bribes from K&H Vice President John Thomas in conjunction with K&H produce transactions on

twelve separate occasions. In October 1999, a grand jury indicted Thomas on seven counts of bribing a public official, in violation of 18 U.S.C. § 201(b)(1)(A). A year later, Thomas pled guilty to a one-count information stating that he "made cash payments to [USDA] produce inspectors in order to obtain expedited inspections." J.A. 664.

On July 17, 2002, the USDA's Agricultural Marketing Service filed an administrative complaint charging K&H with violating PACA by bribing a produce inspector. On February 12, 2003, the Service determined that both Michael and Barry Hirsch were "responsibly connected" to K&H within the meaning of PACA. (The significance of this determination is discussed in Part II.) The Hirsches then filed petitions for review of the "responsibly connected" determinations, and an administrative law judge (ALJ) consolidated those proceedings with the ongoing disciplinary proceeding against the company.

In 2004, the ALJ conducted an eight-day hearing. Cashin testified that, beginning in the late 1980s or early 1990s, Thomas paid him a fifty-dollar bribe for each inspection. In return, Cashin said he "help[ed]" K&H by altering some aspects of its inspection certificates, J.A. 29, although he could not recall precisely how he changed the certificates.

When Thomas testified, he admitted paying bribes to USDA produce inspectors. He said that he began this practice in the "mid or late[] '80s," when he was visited by a produce inspector named Danny Arcery. J.A. 196. Thomas said that Arcery visited

him after Thomas lodged several complaints with the USDA about late inspections. According to Thomas, Arcery told him:

> In order to avoid late inspections, here's what has to be done, you will give a tip of $25.00 to an inspector to come quicker rather than purposely later. . . . If you follow these instructions, everything will be okay. No more calls. No more calls. Don't call Washington. We've got people down there.

J.A. 197-98.[1] Thomas testified that Arcery also told him that, if he did not make the payments, "[then] don't hold your breath for an inspection . . . the shit will rot in the box until somebody comes." J.A. 198. Thomas explained that the purpose of the bribes was always "to get a quicker inspection," and he denied ever asking Cashin or any other produce inspector to falsify an inspection report. J.A. 205. He testified that no one else at K&H, including the Hirsches, knew that he was bribing produce inspectors throughout the 1980s and 1990s. When asked why he never reported the corrupt inspectors to the authorities, Thomas testified that he "was afraid." J.A. 220. But when asked what he was afraid Arcery would do, Thomas replied, "I had no idea." J.A. 220.

The ALJ issued his decision and order on December 3, 2004. *See Kleiman & Hochberg, Inc.*, PACA Docket Nos. D-02-0021, APP-03-0005, APP-03-0006 (U.S.D.A. Dec. 3, 2004). He found that there

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[1] Thomas testified that the amount of the bribes increased to fifty dollars per inspection in the 1990s.

was "undisputed evidence that Thomas bribed Cashin in connection with" twelve separate produce inspections. *Id.* at 9. The ALJ concluded that K&H had violated PACA and that the Hirsches were responsibly connected to the company. *Id.* at 18-19. After considering the circumstances of the case, however, he declined to revoke K&H's license, and instead assessed a penalty of $180,000. *Id.* at 33.

All of the parties appealed to the USDA's Judicial Officer, to whom the Secretary has delegated authority for final decisionmaking in adjudicatory proceedings. *See* 7 C.F.R. § 2.35(a). The Judicial Officer issued his decision and order on April 5, 2006. *See Kleiman & Hochberg, Inc.*, PACA Docket Nos. D-02-0021, APP-03-0005, APP-03-0006 (U.S.D.A. Apr. 5, 2006) (Judicial Officer Decision). He disagreed with the ALJ in only one respect, concluding that the appropriate sanction was revocation of K&H's PACA license. *Id.* at 31-35.

After the Judicial Officer denied their petition for reconsideration, K&H and Michael Hirsch petitioned for review in this court pursuant to 28 U.S.C. § 2342(2). Barry Hirsch also petitioned, but he died on April 10, 2007, and thereafter the petition was dismissed as to him. The Judicial Officer has stayed his orders pending the outcome of our review.

The petitioners raise a series of challenges to the Judicial Officer's decision. In Part II, we review the regulatory regime established by PACA and explain how it was applied in this case. In Part III, we consider the petitioners' challenges.

II

Congress enacted PACA "to facilitate interstate commerce in fresh fruits and vegetables. To help instill confidence in parties dealing with each other on short notice, across state lines and at long distances, it provides special sanctions against dishonest or unreliable dealing." *Veg-Mix, Inc. v. USDA*, 832 F.2d 601, 604 (D.C. Cir. 1987) (citation omitted). Because the "industry [was] thought to be unusually prone to fraud and to unfair practices," *Tri-County Wholesale Produce Co. v. USDA*, 822 F.2d 162, 163 (D.C. Cir. 1987), PACA erected a strict regulatory regime. The Act requires persons who buy or sell specified quantities of perishable agricultural commodities at wholesale in interstate commerce to have a license issued by the Secretary of Agriculture, *see* 7 U.S.C. §§ 499a(b)(5)-(7), 499c(a), and makes it unlawful for a licensee to engage in certain types of unfair conduct, *see id.* § 499b. The relevant prohibition in this case, § 499b(4), makes it unlawful for a licensee to "fail, without reasonable cause, to perform any specification or duty, express or implied, arising out of any undertaking in connection with" any transaction in interstate or foreign commerce involving a perishable agricultural commodity. *Id.* § 499b(4). PACA also includes a respondeat superior provision, which deems the acts of a licensee's agents that fall within the scope of their employment to be the acts of the licensee. *Id.* § 499p.

If the Secretary of Agriculture determines that a PACA licensee has violated § 499b(4), the Secretary is authorized to impose a range of

sanctions. *See id.* § 499h. "[I]f the violation is flagrant or repeated, the Secretary may, by order, revoke the license of the offender." *Id.* § 499h(a). A license revocation can have serious repercussions for individuals who are associated with the licensee. When an entity's PACA license is revoked, the Act prohibits any person who was "responsibly connected" to the entity from working for any other licensee for at least one year. *Id.* § 499h(b).

Prior to 1995, PACA defined "responsibly connected" as (inter alia) "affiliated or connected with a commission merchant, dealer, or broker as . . . [an] officer, director, or holder of more than 10 per centum of the outstanding stock of a corporation or association." 7 U.S.C. § 499a(b)(9) (1994). Congress amended that definition in 1995. *See* 7 U.S.C. § 499a(b)(9). Under the amended statute, the Secretary "must first determine if an individual" is an officer, director, or holder of more than ten percent of the violating licensee's stock. *Norinsberg v. USDA*, 162 F.3d 1194, 1197 (D.C. Cir. 1998). "If so, the burden shifts to the individual to demonstrate that he was not actively involved [in the violation] and that he was either only a nominal officer or not an owner of a licensee within the meaning of the statute." *Id.*; *see infra* Part III.E.

The Judicial Officer applied the foregoing provisions of PACA as follows. First, he concluded that Thomas' payment of bribes to USDA produce inspectors breached an implied duty and thereby violated § 499b(4). Next, he determined that those violations should be imputed to K&H under § 499p. He further concluded that the violations were

willful, flagrant, and repeated, and imposed the maximum sanction of license revocation, as authorized by § 499h(a). Finally, he determined that Michael Hirsch was "responsibly connected" to K&H under § 499a(b)(9), a finding that triggered PACA's employment restrictions. The petitioners challenge all of these conclusions.

III

"We review final decisions in PACA cases under the deferential standard of the Administrative Procedure Act, 5 U.S.C. § 706(2)(A), (E). Under that standard, we must 'uphold the Judicial Officer's decision unless we find it to be arbitrary, capricious, an abuse of discretion, not in accordance with law, or unsupported by substantial evidence.'" *Kirby Produce Co. v. USDA*, 256 F.3d 830, 833 (D.C. Cir. 2001) (quoting *JSG Trading Corp. v. USDA*, 176 F.3d 536, 541 (D.C. Cir. 1999) ("*JSG Trading I*")). As we read their briefs, the petitioners challenge five aspects of the Judicial Officer's decision: (1) the determination that Thomas' payment of bribes to produce inspectors violated the "implied duty" clause of § 499b(4); (2) the treatment of Thomas' actions as the actions of K&H under § 499p; (3) the decision to revoke K&H's license under § 499h(a), rather than to impose a lesser sanction; (4) the Secretary's failure to provide petitioners with notice and an opportunity to halt Thomas' unlawful conduct before revoking K&H's license; and (5) the determination that Michael Hirsch was "responsibly connected" to K&H under § 499a(b)(9). We consider each objection in turn.

A

We begin with the petitioners' challenge to the Judicial Officer's determination that Thomas' bribes violated 7 U.S.C. § 499b(4), which makes it unlawful to "fail, without reasonable cause, to perform any specification or duty, express or implied, arising out of any undertaking in connection with" a produce transaction. 7 U.S.C. § 499b(4). The Judicial Officer's application of this section proceeded in two stages. First, he held that Thomas failed to perform an implied "duty to refrain from making payments to [USDA] produce inspectors in connection with the inspection of perishable agricultural commodities." Judicial Officer Decision at 27. Second, he held that Thomas did not have "reasonable cause" for failing to perform the duty. *See id.* at 44-46.

At oral argument before this court, the petitioners did not dispute the Judicial Officer's interpretation of § 499b(4) as encompassing a duty to refrain from bribing government produce inspectors. *See* Oral Arg. Recording at 3:15. This turned out to be a prescient allocation of their legal ammunition, because another panel subsequently affirmed an identical interpretation of § 499b(4). In *Coosemans Specialties*, the court explained that the USDA's interpretation of PACA is entitled to deference under the two-step framework of *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837 (1984). *Coosemans Specialties*, 482 F.3d at 564; *see also Norinsberg*, 162 F.3d at 1199. Under that framework, if "the intent of Congress is clear, . . . [a court] must give effect to the unambiguously expressed intent of Congress." *Chevron*, 467 U.S. at 842-43. But "if the statute is

silent or ambiguous with respect to the specific issue," the court must uphold the agency's interpretation as long as it is reasonable. *Id.* at 843. Applying that framework, *Coosemans Specialties* concluded that the implied duty clause is ambiguous, and that the Judicial Officer's view that it "includes a duty not to bribe USDA inspectors . . . is reasonable," because "[i]t is consistent with the purposes of the Act . . . to protect producers and other merchants from dishonest and irresponsible conduct." 482 F.3d at 565-66.[2]

The Second Circuit reached the same result in *G&T Terminal Packaging Co. v. USDA*, 468 F.3d 86 (2d Cir. 2006), another case arising out of the corruption at Hunts Point. After finding the "implied duty" language of § 499b(4) to be ambiguous, it "affirm[ed] as reasonable the Secretary's conclusion that the PACA imposes an implied duty upon licensees to refrain from making payments to USDA inspectors in connection with produce inspections, irrespective of whether those payments induce, or are intended to induce, the inspectors to issue inaccurate inspection certificates." *Id.* at 96. "Indeed," the court said, given PACA's statutory scheme, "which assigns government inspectors to protect the financial interests of distant shippers by

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[2] As we noted in *Coosemans Specialties*, we had previously "upheld the Secretary's construction of the implied duty clause as including a prohibition on commercial bribery," that is, the payment of bribes by a seller to a buyer's employee, without the knowledge of the employer. 482 F.3d at 565 (citing, inter alia, *JSG Trading Corp. v. Dep't of Agric.*, 235 F.3d 608, 610-11 (D.C. Cir. 2001) ("*JSG Trading II*"); *JSG Trading I*, 176 F.3d at 543).

providing impartial assessments of the condition of the produce upon arrival, we can hardly conceive of a duty more clearly implicated than the obligation of recipients not to make side-payments to these inspectors." *Id.* at 96-97 (citations omitted). We agree. Rather than attack the Judicial Officer's construction of "implied duty," K&H and Hirsch direct their fire at the second part of the Officer's analysis: his rejection of their argument that Thomas had "reasonable cause" for bribing Cashin because he was the victim of "extortion." The Judicial Officer rejected that argument for two reasons. He concluded that: (1) Thomas was *not* the victim of "extortion," Judicial Officer Decision at 45, and (2) even if he was, "[t]he extortion cited by [petitioners] is not a 'reasonable cause' under . . . PACA," *id.* at 46 (citation omitted). We affirm both determinations.

The Judicial Officer's rejection of the petitioners' claim that Thomas' payments were the result of extortion is reasonable. There is no evidence in the record that Cashin made threats of any kind to induce Thomas to make the payments. Rather, the only evidence that anyone ever threatened Thomas is Thomas' testimony (recounted above) that a different produce inspector, Arcery, did so a full decade prior to the bribes at issue here. According to Thomas, Arcery told him in the mid- to late-1980s that unless he paid bribes, K&H's produce would "rot in the box until somebody comes," and warned him that he should not "call Washington" because "[w]e've got people down there." J.A. 198. These statements do not compel a

conclusion that Thomas' payments to Cashin a decade later were involuntary.

The Judicial Officer was also justified in concluding that, even if Thomas' payments were induced by extortion, the type of "extortion cited by [the petitioners] is not a 'reasonable cause' under [PACA] for [K&H]'s failure to perform the implied duty to refrain from [bribing] produce inspectors." Judicial Officer Decision at 46. First, under *Chevron* step one, PACA is ambiguous as to whether extortion provides "reasonable cause" for bribery. *See G&T Terminal*, 468 F.3d at 98. It could hardly be otherwise, as there is nothing in the statute that defines "reasonable cause" or mentions extortion or bribery. The petitioners do not argue to the contrary.

Moving to *Chevron* step two, we find that the Judicial Officer's interpretation of the "reasonable cause" provision is reasonable. Like the Second Circuit, "[w]e may presume that there are species of coercion so extreme that they rob an individual of any meaningful opportunity to resist." *Id.* But there was no such coercion in this case. The "threats" Arcery allegedly made to Thomas were in any event "'soft' enough to support the view that no reasonable cause existed for the petitioners' breach of duty." *Id.*; *see also id.* (noting that the inspectors at Hunts Point did not "physically threaten[]" the bribe payer and did not threaten "the loss or destruction of his business, harm to his family or employees, blackmail, or the outright denial of produce inspections"). Like the bribe payer in *G&T Terminal*, Thomas had "choices about how to respond to [the inspector's] demands for illegal payments -- hard

choices, perhaps, but meaningful ones all the same." *Id.* at 99.

In sum, we affirm the Judicial Officer's reasonable determination that Thomas violated § 499b(4): his conduct breached the implied duty not to bribe USDA inspectors, and he had no "reasonable cause" for so doing.

B

The petitioners next challenge the Judicial Officer's determination that Thomas' actions should be deemed the actions of K&H under 7 U.S.C. § 499p, PACA's respondeat superior provision. Section 499p provides that "the act, omission, or failure of any agent, officer, or other person acting for or employed by any [licensee], within the scope of his employment or office, shall in every case be deemed the act, omission, or failure of such [licensee]." 7 U.S.C. § 499p. In applying this provision, the Judicial Officer found that "Thomas paid bribes to [USDA] produce inspectors at [K&H's] place of business, during regular working hours, and in connection with the inspection of perishable agricultural commodities purchased, received, and accepted by [K&H]." Judicial Officer Decision at 48. Further, "Thomas was authorized to apply for" produce inspections by K&H, and the bribes he paid "were intended to benefit" the company. *Id.* at 48-49. The Officer concluded that "[t]he record clearly establishes that John Thomas was [acting] within the scope of his employment" when he bribed Cashin. *Id.* at 48. Accordingly, under § 499p, "the knowing and willful bribes by John Thomas are

deemed to be knowing and willful bribes by" K&H. *Id.* at 25.

We find no fault in the Judicial Officer's application of § 499p. In a similar case, we upheld the Secretary's determination that an employee's payment of bribes to a USDA inspector for the benefit of his company fell within the scope of his employment. *See Post & Taback, Inc. v. Dep't of Agric.*, 123 F. App'x 406, 408 (D.C. Cir. 2005). Other courts have reached the same result. *See, e.g.*, *Koam Produce, Inc. v. DiMare Homestead, Inc.*, 329 F.3d 123, 130 (2d Cir. 2003). Indeed, at oral argument, counsel for the petitioners conceded that an officer of a company generally acts "within the scope of his employment" when he pays a bribe to a produce inspector. Oral Arg. Recording at 7:44.

The petitioners offer two reasons why § 499p is nonetheless inapplicable to this case. First, they contend that Thomas' actions were "secret" and "undiscoverable," Pet'rs Br. 35, and that, as a consequence, K&H "had absolutely no . . . ability to control what Thomas did with the inspectors," *id.* at 34. As the government correctly notes, this rhetoric overstates the situation. Thomas was not, as the petitioners suggest, some third-party actor beyond the company's control; to the contrary, he was the company's one-third owner and treasurer and had worked for the company for thirty years. More important, the petitioners' argument contradicts the express language of the statute. Section 499p provides that the act of an officer, within the scope of his employment, "shall *in every case* be deemed the act" of the licensee. 7 U.S.C. § 499p (emphasis

added). As we held in *Post & Taback*, "the plain language of the [section] provides no escape hatch for merchants who allege ignorance of their employees' misconduct." 123 F. App'x at 408 (internal quotation marks and ellipsis omitted).

Second, the petitioners argue that Thomas' bribes did not have "any connection with or impact on the actual produce transactions between Petitioners and their shippers and suppliers," and did not cause any "damage." Pet'rs Br. 33. This second argument has the same flaws as the first. It is factually incorrect because, as we noted in *Coosemans Specialties*, companies that paid bribes to expedite their inspections at Hunts Point "jump[ed] to the front of the line for inspections, thereby delaying the inspections of their competitors." 482 F.3d at 563; *see id.* at 567 (noting that this "conduct not only gave [the company] a competitive advantage, but it also increased the pressure on other merchants to engage in bribery to remain competitive"); *see also* Judicial Officer Decision at 20 (finding that Thomas pled guilty to making "cash payments to [USDA] produce inspectors in order to obtain expedited inspections"). Moreover, and again more important, the statute requires imputation of wrongful conduct to the licensee "in every case," 7 U.S.C. § 499p -- not simply in those cases in which damage was done.

Finally, the petitioners contend that, if § 499p is interpreted according to its express terms, it amounts to "an unconstitutional irrebuttable presumption" because it "provide[s] that certain facts (Thomas' admitted payments) shall be

conclusive evidence of guilt of Petitioners," thereby depriving them of "the right to engage in . . . one of the common occupations of life." Pet'rs Br. 35-36. In fact, § 499p simply makes applicable to wholesale produce merchants the principle of respondeat superior, a substantive legal doctrine widely accepted at common law[3] and widely incorporated into federal regulatory statutes.[4] Whether or not we call that doctrine an "irrebuttable presumption,"[5] if applying it "does not abridge a fundamental right or discriminate against a suspect class, it [must be] upheld if it 'bears a rational relation to a legitimate legislative goal.'" *Delong v. Dep't of Health & Human Servs.*, 264 F.3d 1334, 1341 (Fed. Cir. 2001) (brackets and ellipsis omitted) (quoting *Weinberger*

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[3] *See* Oliver W. Holmes, Jr., *Agency*, 4 HARV. L. REV. 345, 356 (1891).

[4] *See, e.g.*, 7 U.S.C. § 63 (cotton standards); *id.* § 87d (grain standards); *id.* § 223 (packers and stockyards); *id.* § 511*l* (tobacco inspection); *id.* § 2139 (transportation of animals); *id.* § 8313(c) (animal health protection); 15 U.S.C. § 431(f) (discrimination against farmers' cooperative associations by boards of trade); 21 U.S.C. § 63 (filled milk); *id.* § 461(a) (poultry and poultry products inspection); *id.* § 1041(d) (egg products inspection); 47 U.S.C. § 217 (regulation of common carriers in wire or radio communication).

[5] Commentators have noted that the Supreme Court "has not applied the irrebuttable presumption doctrine" since the early 1970s. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW § 9.4 n.65 (3d ed. 2006); *see* GERALD GUNTHER & KATHLEEN M. SULLIVAN, CONSTITUTIONAL LAW 915 (13th ed. 1997) (stating that the irrebuttable presumption doctrine was "abandoned by the Court" in *Weinberger v. Salfi*, 422 U.S. 749 (1975)); *see generally* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1621-24 (2d ed. 1988).

v. Salfi, 422 U.S. 749, 772 (1975)); *see Hawkins v. Agric. Mktg. Serv.*, 10 F.3d 1125, 1133 (5th Cir. 1993); *see generally Edison Elec. Inst. v. EPA*, 391 F.3d 1267, 1272 n.5 (D.C. Cir. 2004); sources cited *supra* note 5.

The petitioners do not claim that there is a fundamental right or suspect class at issue here, and there is no doubt that § 499p bears a rational relation to a legitimate legislative goal. By imposing liability on licensees whose agents violate PACA, the respondeat superior doctrine encourages produce companies to "use [their] control over the employee to prevent" violations of the Act. *Sullivan v. Freeman*, 944 F.2d 334, 336 (7th Cir. 1991) (discussing the role of the doctrine in general). "While admittedly the result Congress desired could be harsh in some cases, we cannot say that [the statute] is not reasonably designed to achieve the desired Congressional purpose." *Zwick v. Freeman*, 373 F.2d 110, 118 (2d Cir. 1967) (specifically referring to § 499h(b), which restricts the employment of "responsibly connected" persons).

The petitioners disparage the Judicial Officer's attribution of Thomas' misconduct to the company as a "rote application" of § 499p. Pet'rs Br. 32. In our view, this is just another way of saying that the Officer was faithful to the statutory text. And that is his -- and our -- responsibility.

C

Third, the petitioners argue that the Judicial Officer's decision to revoke K&H's PACA license is

"unsupported by the great weight of the evidence and is arbitrary and capricious." Pet'rs Br. 44. As we have repeatedly noted, "'[w]e will not lightly disturb the [USDA's] choice of a remedy under a statute committed to its enforcement, especially given the Department's superior knowledge of the industry PACA regulates.'" *Coosemans Specialties*, 482 F.3d at 566-67 (quoting *JSG Trading II*, 235 F.3d at 617).

If a licensee's violation of PACA § 499b "is flagrant or repeated, the Secretary may, by order, revoke the license of the offender." 7 U.S.C. § 499h(a). The Judicial Officer found that K&H's violations of § 499b(4) were both flagrant *and* repeated, *see* Judicial Officer Decision at 30-31, and the petitioners do not challenge those findings. The Officer was therefore authorized to revoke K&H's license, and his decision to do so was fully consistent with precedent. In numerous cases arising out of the government's investigation at Hunts Point, revocation was the sanction imposed for bribing produce inspectors. *See, e.g.*, *Coosemans Specialties, Inc.*, PACA Docket No. D-02-0024 (U.S.D.A. Apr. 20, 2006); *In re M. Trombetta & Sons, Inc.*, PACA Docket No. D-02-0025 (U.S.D.A. Sept. 27, 2005); *G&T Terminal Packaging Co.*, PACA Docket No. D-03-0026 (U.S.D.A. Sept. 8, 2005).

The Judicial Officer was not required, of course, to impose the sanction of revocation and could have opted for a lesser punishment. He chose not to do so because of the "egregious" nature of the bribes. Judicial Officer Decision at 34. The petitioners protest that Thomas' conduct was not egregious, because his bribes "had no effect on

K&H's dealings with its suppliers." Pet'rs Br. 45. But the Judicial Officer relied on the testimony of John Koller, an official at the USDA's Agricultural Marketing Service, who testified that bribery of produce inspectors undermines the credibility of the entire PACA inspection process and increases the likelihood that other produce wholesalers will engage in similar illicit conduct. Judicial Officer Decision at 33.[6] License revocation was necessary, Koller said, in order to "deter other members of the industry from . . . making bribery payments." *Id.* Under these circumstances, we have no ground for finding the Judicial Officer's choice of sanctions unreasonable. *See also Butz v. Glover Livestock Comm'n Co.*, 411 U.S. 182, 188-89 (1973) ("The fashioning of an appropriate and reasonable remedy is for the Secretary, not the court.").

D

The petitioners' fourth argument is that the Secretary violated the Administrative Procedure Act (APA) by instituting proceedings to revoke K&H's license without first providing the company with notice of Thomas' unlawful conduct and an opportunity to curb it. Once again, the plain text of the statute bars the petitioners' argument. The relevant section of the APA states: "*Except in cases of willfulness*[,] . . . revocation . . . of a license is

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[6] *See also Post & Taback, Inc.*, 62 Agric. Dec. 802, 825 (2003) ("[U]nlawful gratuities and bribes paid to [USDA] inspectors threaten the integrity of the entire inspection system and undermine the produce industry's trust in the entire inspection system."), *petition for review denied*, 123 F. App'x 406 (D.C. Cir. 2005).

lawful only if, before the institution of agency proceedings therefor, the licensee has been given -- (1) notice by the agency in writing of the facts or conduct which may warrant the action; and (2) opportunity to demonstrate or achieve compliance with all lawful requirements." 5 U.S.C. § 558(c) (emphasis added). Here, the Judicial Officer found that K&H's violations of PACA were willful, *see* Judicial Officer Decision at 28-31 & n.8, thus bringing the case within the exception to the APA's notice requirement.

In applying § 558(c) to PACA violations, we have held that "'an action is willful if a prohibited act is done intentionally, irrespective of evil intent, or done with careless disregard of statutory requirements.'" *Coosemans Specialties*, 482 F.3d at 567 (quoting *Finer Foods Sales Co. v. Block*, 708 F.2d 774, 778 (D.C. Cir. 1983)). Applying this standard, the Judicial Officer found that Thomas, and therefore K&H, had willfully violated PACA by paying unlawful bribes to Cashin. This finding is supported by substantial evidence. Thomas pled guilty to an information stating that he "unlawfully, wilfully, knowingly, directly and indirectly, did corruptly give, offer and promise things of value to public officials." J.A. 664. And Thomas' own description of his bribes during his testimony before the ALJ shows that his conduct was intentional. *See* J.A. 201-06. On virtually identical evidence, *Coosemans Specialties* held that a PACA violation was willful and hence that the APA's notice provision was inapplicable. 482 F.3d at 567-68. We do so here as well. Indeed, we could not do otherwise without requiring the USDA to disclose an

undercover law enforcement operation as soon as it detects a criminal violation.[7]

E

Finally, petitioner Michael Hirsch challenges the Judicial Officer's determination that he was "responsibly connected" to K&H during the period in which the company violated PACA. Section 499h(b) provides that "any person who is or has been responsibly connected with any [entity] whose license has been revoked" may not be employed by any other PACA licensee for at least one year. 7 U.S.C. § 499h(b). Because the Judicial Officer revoked K&H's license, the determination that Hirsch was responsibly connected to K&H makes him subject to this restriction.

PACA defines a "responsibly connected" person as one who is "affiliated or connected with a [licensee] as . . . [an] officer, director, or holder of more than 10 per centum of the outstanding stock." *Id.* § 499a(b)(9). There is no dispute that Hirsch -- who was all three -- comes within this definition. As noted above, however, a 1995 amendment qualified the definition. It provided:

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[7] Petitioners also suggest, obliquely, that Michael Hirsch was individually entitled to notice under APA § 558(c). *See* Pet'rs Br. 25. Section 558(c), however, applies only to "licensees." It does not require notice to the directors, officers, or owners of a licensee who are not themselves licensed. In this case, K&H was the only party that maintained a license, *see* J.A. 655-62, and that license is the only one at issue in these proceedings.

> A person shall not be deemed to be responsibly connected if the person demonstrates by a preponderance of the evidence that the person was not actively involved in the activities resulting in a violation of [PACA] and that the person either was only nominally . . . [an] officer, director, or shareholder of a violating licensee . . . or was not an owner of a violating licensee . . . which was the alter ego of its owners.

Id. Under the amended statute, the Secretary "must first determine if an individual" is an officer, director, or holder of more than ten percent of the violating licensee's stock. *Norinsberg*, 162 F.3d at 1197. "If so, the burden shifts to the individual to demonstrate [by a preponderance of the evidence] that he was not actively involved [in the violation] *and* that he was either only a nominal officer or not an owner of a licensee within the meaning of the statute." *Id.* (emphasis added). Hirsch did demonstrate that he was not actively involved in Thomas' bribery, *see* Judicial Officer Decision at 37, thus rendering this exception potentially available. However, because he makes no claim that he was "not an owner of a violating licensee . . . which was the alter ego of its owners,"[8] he must prove that he was "only nominally . . . [an] officer, director [and]

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[8] "[T]he 'alter ego' exception applie[s] to 'cases in which the violator, although formally a corporation, is essentially an alter ego of its owners, so dominated as to negate its separate personality.' A petitioner who [is] not a true owner of such a corporation [will] be spared the consequences of the responsibly connected determination." *Coosemans Specialties*, 482 F.3d at 568 (quoting *Norinsberg*, 162 F.3d at 1197).

shareholder" of K&H to obtain the exception's benefit.

Hirsch did not prove that he qualified for the "nominal" exception, nor could he do so. As Hirsch concedes, he owned 31.6 percent of the corporation's outstanding stock, was the company's President, and was "actively engaged in the day-today operations, management, *and control* of K&H." Pet'rs Br. 25 (emphasis added).

Nonetheless, Hirsch again notes that Thomas' bribes were undisclosed, and insists that a person cannot be responsibly connected to a violating licensee unless he "either knew or should have known about the violations and then failed to take action to counteract the actions of others constituting the violations." *Id.* at 27. But neither the statutory definition of "responsibly connected" (an "officer, director, or holder of more than 10 per centum of the outstanding stock," 7 U.S.C. § 499a(b)(9)), nor the statutory "nominal" and "alter ego" exceptions suggest such a knowledge requirement. And "the inclusion of a specific exception for persons who make a certain showing . . . militate[s] against judicially created exceptions." *Coosemans Specialties*, 482 F.3d at 569.[9]

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[9] As they did with respect to PACA's respondeat superior provision, *see supra* Part III.B, the petitioners suggest that literal enforcement of the "responsibly connected" provision violates Hirsch's due process rights. We rejected this argument in *Siegel v. Lyng*, 851 F.2d 412, 416 n.12 (D.C. Cir. 1988), as have the other circuits that have considered it, *see Hawkins v. Agric. Mktg. Serv.*, 10 F.3d 1125, 1134 (5th Cir. 1993) ("We . . . cannot say that the unambiguous language of §

IV

PACA "is admittedly and intentionally a tough law." S. REP. NO. 84-2507, at 3 (1956) (internal quotation marks omitted). In this case, the USDA's Judicial Officer chose the toughest possible sanction, notwithstanding the active involvement of the USDA's own inspectors in the widespread corruption at Hunts Point. *See Coosemans Specialties*, 482 F.3d at 567. But whether or not we would have levied the same penalty, we cannot say that the Officer's decision in that regard -- or any other regard -- is arbitrary or unreasonable. Accordingly, the petition for review is

Denied.

499a(b)(9) . . . was irrationally conceived or arbitrary in effecting a legitimate governmental objective, i.e., the protection of producers of perishable agricultural products."); *Zwick*, 373 F.2d at 118-19; *Birkenfield v. United States*, 369 F.2d 491, 494-95 (3d Cir. 1966).

ENTERED JUNE 2, 2006

UNITED STATES DEPARTMENT OF AGRICULTURE

BEFORE THE SECRETARY OF AGRICULTURE

In re: PACA Docket No. D-02-0021

Kleiman & Hochberg, Inc.,

Respondent

and

Michael H. Hirsch, PACA Docket No. APP-03-0005

Petitioner

and

Barry J. Hirsch, PACA Docket No. APP-03-0006

Petitioner

Order Denying Petition to Reconsider

PROCEDURAL HISTORY

Eric M. Forman, Associate Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture [hereinafter the Agricultural Marketing Service], instituted this administrative proceeding by filing a Complaint on

July 17, 2002. The Agricultural Marketing Service instituted the proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. §§ 499a-499s) [hereinafter the PACA]; the regulations promulgated pursuant to the PACA (7 C.F.R. pt. 46); and the Rules of Practice Governing Formal Adjudicatery Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) [hereinafter the Rules of Practice].

The Agricultural Marketing Service alleges Kleiman & Hochberg, Inc.: (1) during the period March 1999 through August 1999, through its employee, John Thomas, made illegal payments to a United States Department of Agriculture produce inspector in connection with 12 federal inspections of perishable agricultural commodities which Kleiman & Hochberg, Inc., purchased, received, and accepted from eight sellers in interstate or foreign commerce, in willful, flagrant, and repeated violation of section 2(4) of the PACA (7 U.S.C. § 499b(4)); and (2) prior to March 1999, made illegal payments to a United States Department of Agriculture produce inspector on numerous occasions, in willful, flagrant, and repeated violation of section 2(4) of the PACA (7 U.S.C. § 499b(4)) (Compl. ¶¶ III, V-VI). On September 17, 2002, Kleiman & Hochberg, Inc., filed an answer denying the material allegations of the Complaint (Answer).

On February 12, 2003, James R. Frazier, Chief, PACA Branch, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture [hereinafter the Chief], issued determinations that Michael H. Hirsch and

Barry J. Hirsch were responsibly connected with Kleiman & Hochberg, Inc., during the period March 26, 1999, through August 4, 1999, when Kleiman & Hochberg, Inc., violated the PACA. On March 14, 2003, Michael H. Hirsch and Barry J. Hirsch each filed a Petition for Review of the Chief's determination pursuant to the PACA and the Rules of Practice seeking reversal of the Chief's February 12, 2003, determination that he was responsibly connected with Kleirnan & Hochberg, Inc.

On April 4, 2003, former Chief Administrative Law Judge James W. Hunt consolidated the disciplinary proceeding, *In re Kleiman & Hochberg, Inc.*, PACA Docket No. D-02-0021, with the two responsibly connected proceedings, *In re Michael H. Hirsch*, PACA Docket No. APP-03-0005, and *In re Barry J. Hirsch*, PACA Docket No. APP-03-0006 (Order Consolidating Cases for Hearing).

On March 1 through March 4, and March 15 through March 18, 2004, Chief Administrative Law Judge Marc R. Hillson [hereinafter the Chief ALJ] presided over a hearing in New York, New York. Charles L. Kendall and Christopher Young-Morales, Office of the General Counsel, United States Department of Agriculture, Washington, DC, represented the Agricultural Marketing Service and the Chief. Mark C.H. Mandell and David H. Gendelman represented Kleiman & Hochberg, Inc., Michael H. Hirsch, and Barry J. Hirsch.

On December 3, 2004, after the parties filed post-hearing briefs, the Chief ALJ issued a Decision [hereinafter Initial Decision] in which the Chief ALJ:

(1) concluded Kleiman & Hochberg, Inc., committed willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) when John Thomas, Kleiman & Hochberg, Inc.'s vice president and part owner, paid bribes to a United States Department of Agriculture produce inspector in connection with 12 federal inspections of perishable agricultural commodities which Kleiman & Hochberg, Inc., purchased, received, and accepted from eight sellers in interstate and foreign commerce; (2) concluded Michael H. Hirsch and Barry J. Hirsch were responsibly connected with Kleiman & Hochberg, Inc., when Kleiman & Hochberg, Inc., violated the PACA; and (3) assessed Kleiman & Hochberg, Inc., a $180,000 civil penalty (Initial Decision at 18-19, 35).

On January 21, 2005, the Agricultural Marketing Service and the Chief appealed to the Judicial Officer. On January 24, 2005, Kleiman & Hochberg, Inc., Michael H. Hirsch, and Barry J. Hirsch appealed to the Judicial Officer. On March 16, 2005, the Agricultural Marketing Service and the Chief filed a response to Kleiman & Hochberg, Inc.'s, Michael H. Hirsch's, and Barry J. Hirsch's appeal petition. On March 17, 2005, Kleiman & Hochberg, Inc., Michael H. Hirsch, and Barry J. Hirsch filed a response to the Agricultural Marketing Service's and the Chiefs appeal petition. On March 17, 2005, the Hearing Clerk transmitted the record to the Judicial Officer for consideration and decision.

On April 5, 2006, I issued a Decision and Order: (1) concluding Kleiman & Hochberg, Inc., willfully, flagrantly, and repeatedly violated section 2(4) of the PACA (7 U.S.C. § 499b(4)); (2) concluding

Michael H. Hirsch and Brian J. Hirsch were *responsibly connected,* as defined by section 1(b)(9) of the PACA (7 U.S.C. § 499a(b)(9)), with Kleiman & Hochberg, Inc., when Kleiman & Hochberg, Inc., violated the PACA; and (3) revoking Kleiman & Hochberg, Inc.'s PACA license.[1]

On April 24, 2006, Kleiman & Hochberg, Inc., Michael H. Hirsch, and Barry J. Hirsch filed "Respondent's and Petitioners' Joint Petition Under § 1.146(a) for Reconsideration of the Decision and Order of the Judicial Officer Dated April 5, 2006" [hereinafter Petition to Reconsider] and requested oral argument before the Judicial Officer. On May 12, 2006, the Agricultural Marketing Service and the Chief filed a response to the Petition to Reconsider. On May 26, 2006, the Hearing Clerk transmitted the record to the Judicial Officer for a ruling on Kleiman & Hochberg, Lie's, Michael H. Hirsch's, and Barry J. Hirsch's Petition to Reconsider.

CONCLUSIONS BY THE JUDICIAL OFFICER ON RECONSIDERATION

Kleiman & Hochberg, Inc.'s, Michael H. Hirsch's, and Barry J. Hirsch's Request for Oral Argument

Kleiman & Hochberg, Inc.'s, Michael H. Hirsch's, and Barry J. Hixsch's request for oral argument before the Judicial Officer is denied because the issues are not complex and oral argument would appear to serve no useful purpose.

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[1] *In re Kleiman & Hochberg, Inc.*, 65 Agric. Dec.__, slip op. at 22-23, 55-56 (Apr. 5, 2006).

Kleiman & Hochberg, Inc.'s, Michael H. Hirsch's, and Barry J. Hirsch's Petition to Reconsider

Kleiman & Hochberg, Inc., Michael H. Hirsch, and Barry J, Hirsch raise two issues in the Petition to Reconsider. First, Kleiman & Hochberg, Inc., Michael H. Hirsch, and Barry J. Hirsch contend Kleiman & Hochberg, Inc., did not violate section 2(4) of the PACA (7 U.S.C. § 499b(4)) because Kleiman & Hochberg, Inc., had no means to control John Thomas' payments to a United States Department of Agriculture produce inspector (Pet. to Reconsider at 2-5).

The relationship between a PACA licensee and persons acting for, or employed by, the PACA licensee is governed by section 16 of the PACA (7 U.S.C. § 499p) which provides, in construing and enforcing the PACA, the act of any agent, officer, or other person acting for, or employed by, a commission merchant, dealer, or broker, within the scope of his or her employment or office, shall *in every case* be deemed the act of the commission merchant, dealer, or broker as that of the agent, officer, or other person. Essentially, section 16 of the PACA (7 U.S.C. § 499p) provides an identity of action between a PACA licensee and the PACA licensee's agents and employees.

Kleiman & Hochberg, Inc.'s vice president and holder of 31.6 percent of the outstanding stock of Kleiman & Hochberg, Inc., John Thomas, was acting within the scope of employment when he knowingly and willfully bribed a United States Department of Agriculture produce inspector. Thus, as a matter of

law, the knowing and willful violations by John Thomas are deemed to be knowing and willful violations by Kleiman & Hochberg, Inc., even if Kleiman & Hochberg, Inc., had no means to control John Thomas' payments to the United States Department of Agriculture produce inspector. The United States Court of Appeals for the Sixth Circuit addressed the issue of identity of action between a corporate PACA licensee and the corporate PACA licensee's employees in a case involving alterations of United States Department of Agriculture inspection certificates by employees of the corporate PACA licensee, as follows:

> MacClaren also claims that the Secretary failed to consider all relevant circumstances before deciding to revoke its license. MacClaren complains that the sanction of license revocation falls exclusively on Gregory MacClaren and Darrell Moccia, while Olds and Gottlob are not subject to any penalty. The sanction, however, falls entirely on MacClaren as a company. Furthermore, because Olds, Gottlob and Johnston were acting within the scope of their employment when they knowingly and willfully violated PACA, their knowing and willful violations are deemed to be knowing and willful violations by MacClaren. Under PACA, "the act, omission, or failure of any agent, officer, or other person acting for or employed by any commission merchant, dealer, or broker, within the scope of his

> employment or office, shall in every case be deemed the act, omission, or failure of such commission merchant, dealer, or broker as that of such agent, officer, or other person." 7 U.S.C. § 499p. According to the Sixth Circuit, acts are "willful" when "knowingly taken by one subject to the statutory provisions in disregard of the action's legality." *Hodgins* v. *United States Dep 't ofAgric*, No. 97-3899, 2000 WL 1785733 (6th Cir. Nov. 20, 2000) (quotation omitted). "Actions taken in reckless disregard of statutory provisions may also be considered 'willful.'" *Id.* (quotation and citations omitted). The MacClaren employees admitted to altering USD A inspection certificates and issuing false accounts of sale in knowing disregard of their actions' legality. Accordingly, their willful violations are deemed willful violations by MacClaren.

H.C. MacClaren, Inc. v. United States Dep't ofAgric, 342 F.3d 584, 591 (6th Cir. 2003).

Similarly, in *Koam Produce, Inc.* v. *DiMare Homestead, Inc.*, 329 F.3d 123 (2d Cir. 2003), the Court found that bribes made by a produce wholesaler's employee to a United States Department of Agriculture produce inspector to induce the inspector to falsify United States Department of Agriculture inspection certificates are, under the PACA, deemed the acts of the produce wholesaler, as follows:

> Lastly, we address Koam's equitable argument that our failure to find in its favor would penalize Koam "simply because USDA sent a corrupt inspector to perform the inspection (a decision over which Koam had no control) at the time that Koam was employing a faithless employee [Friedman] (who played no role in any of the DiMare inspections)."... We view the equities differently from Koam, as its argument distorts the facts in at least three ways, ... Third, Koam's attempt to distance itself from Friedman's criminality fails. Friedman was hardly a "faithless servant," since only Koam, not Friedman, stood to benefit from his bribes. Regardless, under PACA, "the act, omission, or failure of any agent, officer, or other person acting for or employed by any commission merchant, dealer, or broker, within the scope of his employment or office, shall in every case be deemed the act omission, or failure of such commission merchant, dealer, or broker...." 7 U.S.C. § 499p. Thus, Friedman's acts-bribing USDA inspectors-are deemed the acts of Koam.

Koam Produce, Inc. v. *DiMare Homestead, Inc.*, 329 F.3d 123, 129-30 (2d Cir. 2003).

John Thomas, the vice president and holder of 31.6 percent of the outstanding stock of Kleiman & Hochberg, Inc., paid bribes to a United States

Department of Agriculture produce inspector. As a matter of law, the violations by Kleiman & Hochberg, Inc.'s officer and part owner are deemed to be violations by Kleiman & Hochberg, Inc., even if Kleiman & Hochberg, Inc., had no means to control John Thomas' payments to the United States Department of Agriculture produce inspector. The clear language of section 16 of the PACA (7 U.S.C. § 499p) would be defeated by any other interpretation.

Second, Kleiman & Hochberg, Inc., Michael H. Hirsch, and Barry J. Hirsch contend, since Michael H. Hirsch and Barry J. Hirsch had no ability to obtain knowledge of or to control John Thomas' payments to a United States Department of Agriculture produce inspector, they cannot be found to be responsibly connected with Kleiman & Hochberg, Inc., without violating their constitutional right to engage in their chosen occupation (Pet. to Reconsider at 6-14).

Individuals found to be responsibly connected with a commission merchant, dealer, or broker, when that commission merchant, dealer, or broker violates section 2 of the PACA (7 U.S.C. § 499b), are subject to employment restrictions under section 8(b) of the PACA (7 U.S.C. § 499h(b)). Under the rational basis test, a statute is presumed to be valid and will be sustained if the statute is rationally related to a legitimate state interest.[2]

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[2] *Schweikerv. Wilson*, 450 U.S. 221, 230 (1981); *United States R.R, Ret Bd. v. Fritz*, 449 U.S. 166, 174-75 (1980); *Vance* v. *Bradley*, 440 U.S. 93, 97 (1979); *New Orleans v. Dukes*, 427 U.S. 297, 303 (1976).

The PACA is designed to protect growers and shippers of perishable agricultural commodities from unfair practices by commission merchants, dealers, and brokers.[3] Section 8(b) of the PACA (7 U.S.C, § 499h(b)), which imposes employment restrictions on persons responsibly connected with commission merchants, dealers, and brokers who violate section 2 of the PACA (7 U.S.C. § 499b), is rationally related to the legitimate governmental objective of the protection of growers and shippers of perishable agricultural commodities. The status of being an officer, a director, or a holder of more than 10 percent of the outstanding stock of a commission merchant, dealer, or broker that has violated section 2 of the PACA (7 U.S.C. § 499b) forms a sufficient nexus to the violating commission merchant, dealer, or broker so that an officer, a director, or a holder of more than 10 percent of the outstanding stock may be deemed *responsibly connected* and subject to the employment sanctions in the PACA.[4] Since the restriction on the employment of *responsibly connected* individuals is rationally related to the purpose of the PACA, section 8(b) of the PACA (7 U.S.C. § 499h(b)) does not unconstitutionally encroach on Michael H. Hirsch's or Barry J, Hirsch's due process rights by arbitrarily interfering with Michael H. Hirsch's or Barry J. Hirsch's chosen occupation.

Contrary to Kleiman & Hochberg, Inc.'s, Michael H. Hirsch's, and Barry J. Hirsch's position, the Fifth Amendment to the Constitution of the United

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[3] H.R. Rep. No. 1041 (1930).

[4] *Birkenfield v. United States*, 369 F.2d 491,494-95 (3d Cir. 1966).

States does not guarantee an unrestricted privilege to engage in a particular occupation.[5] A number of courts have rejected constitutional challenges to employment restrictions in section 8(b) of the PACA (7 U.S.C. § 499h(b)) imposed on individuals found to be responsibly connected with PACA violators.[6]

For the foregoing reasons and the reasons set forth in *In re Kleiman & Hochberg, Inc.*, 65 Agric. Dec. (Apr. 5, 2006), Kleiman & Hochberg, Inc.'s, Michael H. Hirsch's, and Barry J. Hirsch's Petition to Reconsider is denied.

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[5] *Nebbia* v. *People of State of New York*, 291 U.S. 502, 527-28 (1934); *Hawkins* v. *Agricultural Mktg. Serv.*, 10 F.3d 1125, 1133 (5th Cir. 1993); *Zwick v. Freeman*, 373 F.2d 110, 118 (2d Cir.), *cert denied*, 389 U.S. 835 (1967).

[6] *Hawkins* v. *Agricultural Mktg. Serv.*, 10 F.3d 1125 (5th Cir. 1993) (holding the restriction in the PACA upon the employment of persons responsibly connected with a licensee found to have violated the PACA does not violate the due process right to engage in occupations of one's choosing); *George Steinberg & Son, Inc.* v. *Butz*, 491 F.2d 988 (2d Cir.) (holding section 8(b) of the PACA (7 U.S.C. § 499h(b)), restricting persons determined to be responsibly connected with a PACA licensee that has committed violations of the PACA, does not violate the due process right to engage in a chosen occupation), *cert, denied*, 419 U.S. 830 (1974); *Zwick* v. *Freeman*, 373 F.2d 110 (2d Cir.) (rejecting the petitioner's claim that the employment restrictions in section 8(b) of the PACA (7 U.S.C. § 499h(b)) violate the petitioner's right to earn a livelihood in the common occupations of the community; concluding the employment restrictions in section 8(b) of the PACA (7 U.S.C. § 499h(b)) are reasonably designed to achieve the congressional purpose of the PACA), *cert, denied*, 389 U.S. 835 (1967); *Birkenfield v. United States*, 369 F.2d 491 (3d Cir. 1966) (stating the exclusion of persons responsibly connected with a PACA licensee that failed to pay a reparation award from employment in the field of marketing perishable agricultural commodities is not unconstitutional).

Section 1.146(b) of the Rules of Practice (7 C.F.R. § 1.146(b)) provides that the decision of the Judicial Officer shall automatically be stayed pending the determination to grant or deny a timely-filed petition to reconsider. Kleiman & Hochberg, Inc.'s, Michael H. Hirsch's, and Barry J. Hirsch's Petition to Reconsider was timely filed and automatically stayed *In re Kleiman & Hochberg, Inc.*, 65 Agric. Dec.__(Apr. 5, 2006). Therefore, since Kleiman & Hochberg, Inc.'s, Michael H. Hirsch's, and Barry J. Hirsch's Petition to Reconsider is denied, I hereby lift the automatic stay, and the Order in *In re Kleiman & Hochberg, Inc.*, 65 Agric. Dec.__(Apr. 5, 2006), is reinstated; except that the effective date of the Order is the date indicated in the Order in this Order Denying Petition to Reconsider.

For the foregoing reasons, the following Order should be issued.

ORDER

1. Kleiman & Hochberg, Inc., has committed willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)). Kleiman & Hochberg, Inc.'s PACA license is revoked, effective 60 days after service of this Order on Kleiman & ochberg, Inc.

2. I affirm the Chief's February 12,2003, determination that Michael H. Hirsch was responsibly connected with Kleiman & Hochberg, Inc., when Kleiman & Hochberg, Inc., willfully, flagrantly, and repeatedly violated section 2(4) of the PACA (7 U.S.C. § 499b(4)). Accordingly, Michael H. Hirsch is subject to the licensing restrictions under section 4(b) of the PACA and the employment restrictions under section 8(b) of the PACA (7 U.S.C. §§ 499d(b), 499h(b)), effective 60 days after service of this Order on Michael H. Hirsch.

3. I affirm the Chief's February 12, 2003, determination that Barry J. Hirsch was responsibly connected with Kleiman & Hochberg, Inc., when Kleiman & Hochberg, Inc., willfully, flagrantly, and repeatedly violated section 2(4) of the PACA (7 U.S.C. § 499b(4)). Accordingly, Barry J. Hirsch is subject to the licensing restrictions under section 4(b) of the PACA and the employment restrictions under section 8(b) of the PACA (7 U.S.C. §§ 499d(b), 499h(b)), effective 60 days after service of this Order on Barry J. Hirsch.

RIGHT TO JUDICIAL REVIEW

Kleiman & Hochberg, Inc., Michael H. Hirsch, and Barry J. Hirsch have the right to seek judicial review of the Order in this Order Denying Petition to Reconsider in the appropriate United States Court of Appeals in accordance with 28 U.S.C. §§ 2341-2350. Kleiman & Hochberg, Inc., Michael H. Hirsch, and Barry J. Hirsch must seek judicial review within 60 days after entry of the Order in this Order Denying Petition to Reconsider.[7] The date of entry of the Order in this Order Denying Petition to Reconsider is June 2, 2006.

Done at Washington, DC

June 2, 2006

/s/
William G. Jenson
Judicial Officer

[7] See 28 U.S.C. § 2344.

ENTERED APRIL 5, 2006

UNITED STATES DEPARTMENT OF AGRICULTURE

BEFORE THE SECRETARY OF AGRICULTURE

In re:	PACA Docket No. D-02-0021
Kleiman & Hochberg, Inc.,	
Respondent	
and	
Michael H. Hirsch,	PACA Docket No. APP-03-0005
Petitioner	
and	
Barry J. Hirsch,	PACA Docket No. APP-03-0006
Petitioner	**Decision and Order**

PROCEDURAL HISTORY

Eric M. Forman, Associate Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture [hereinafter the Agricultural Marketing Service], instituted this administrative proceeding by filing a Complaint on July 17, 2002. The Agricultural Marketing Service instituted the proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7

U.S.C. §§ 499a-499s) [hereinafter the PACA]; the regulations promulgated pursuant to the PACA (7 C.F.R. pt. 46); and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) [hereinafter the Rules of Practice].

The Agricultural Marketing Service alleges Kleiman & Hochberg, Inc.: (1) during the period March 1999 through August 1999, through its employee, John Thomas, made illegal payments to a United States Department of Agriculture inspector in connection with 12 federal inspections of perishable agricultural commodities which Kleiman & Hochberg, Inc., purchased, received, and accepted from eight sellers in interstate or foreign commerce, in willful, flagrant, and repeated violation of section 2(4) of the PACA (7 U.S.C. § 499b(4)); and (2) prior to March 1999, made illegal payments to a United States Department of Agriculture inspector on numerous occasions, in willful, flagrant, and repeated violation of section 2(4) of the PACA (7 U.S.C. § 499b(4)) (Compl. ¶¶ III, V-VI). On September 17, 2002, Kleiman & Hochberg, Inc., filed an answer denying the material allegations of the Complaint and raising four affirmative defenses (Answer).

On February 12, 2003, James R. Frazier, Chief, PACA Branch, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture [hereinafter the Chief], issued determinations that Michael H. Hirsch and Barry J. Hirsch were responsibly connected with Kleiman & Hochberg, Inc., during the period March

26, 1999, through August 4, 1999, when Kleiman & Hochberg, Inc., violated the PACA. On March 14, 2003, Michael H. Hirsch filed a Petition for Review of the Chief's determination pursuant to the PACA and the Rules of Practice seeking reversal of the Chief's February 12, 2003, determination that he was responsibly connected with Kleiman & Hochberg, Inc. On March 14, 2003, Barry J. Hirsch filed a Petition for Review of the Chief's determination pursuant to the PACA and the Rules of Practice seeking reversal of the Chief's February 12, 2003, determination that he was responsibly connected with Kleiman & Hochberg, Inc.

On April 4, 2003, former Chief Administrative Law Judge James W. Hunt consolidated the disciplinary proceeding, *In re Kleiman & Hochberg, Inc.*, PACA Docket No. D-02-0021, with the two responsibly connected proceedings, *In re Michael H. Hirsch,* PACA Docket No. APP-03-0005, and *In re Barry J. Hirsch*, PACA Docket No. APP-03-0006 (Order Consolidating Cases for Hearing).

On March 1 through March 4, and March 15 through March 18, 2004, Chief Administrative Law Judge Marc R. Hillson [hereinafter the Chief ALJ] presided over a hearing in New York, New York. Charles L. Kendall and Christopher Young-Morales, Office of the General Counsel, United States Department of Agriculture, Washington, DC, represented the Agricultural Marketing Service and the Chief. Mark C.H. Mandell and David H. Gendelman represented Kleiman & Hochberg, Inc., Michael H. Hirsch, and Barry J. Hirsch.

On December 3, 2004, after the parties filed post-hearing briefs, the Chief ALJ issued a Decision [hereinafter Initial Decision] in which the Chief ALJ: (1) concluded Kleiman & Hochberg, Inc., committed willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) when John Thomas, Kleiman & Hochberg, Inc.'s vice president and part owner, paid bribes to a United States Department of Agriculture produce inspector in connection with 12 federal inspections of perishable agricultural commodities which Kleiman & Hochberg, Inc., purchased, received, and accepted from eight sellers in interstate and foreign commerce; (2) concluded Michael H. Hirsch and Barry J. Hirsch were responsibly connected with Kleiman & Hochberg, Inc., when Kleiman & Hochberg, Inc., violated the PACA; and (3) assessed Kleiman & Hochberg, Inc., a $180,000 civil penalty (Initial Decision at 18-19, 35).

On January 21, 2005, the Agricultural Marketing Service and the Chief appealed to the Judicial Officer. On January 24, 2005, Kleiman & Hochberg, Inc., Michael H. Hirsch, and Barry J. Hirsch appealed to, and requested oral argument before, the Judicial Officer. On March 16, 2005, the Agricultural Marketing Service and the Chief filed a response to Kleiman & Hochberg, Inc.'s, Michael H. Hirsch's, and Barry J. Hirsch's appeal petition. On March 17, 2005, Kleiman & Hochberg, Inc., Michael H. Hirsch, and Barry J. Hirsch filed a response to the Agricultural Marketing Service's and the Chief's appeal petition. On March 17, 2005, the Hearing Clerk transmitted the record to the Judicial Officer for consideration and decision.

Kleiman & Hochberg, Inc.'s, Michael H. Hirsch's, and Barry J. Hirsch's request for oral argument before the Judicial Officer, which the Judicial Officer may grant, refuse, or limit,[1] is refused because the parties have throughly briefed the issues and oral argument would appear to serve no useful purpose.

Based upon a careful consideration of the record, I agree with the Chief ALJ's conclusions that Kleiman & Hochberg, Inc., committed willful, flagrant, and repeated violations of the PACA and Michael H. Hirsch and Barry J. Hirsch were responsibly connected with Kleiman & Hochberg, Inc., when Kleiman & Hochberg, Inc., violated the PACA; however, I disagree with the sanction imposed on Kleiman & Hochberg, Inc., by the Chief ALJ. Therefore, I do not adopt the Chief ALJ's Initial Decision as the final Decision and Order.

The Agricultural Marketing Service exhibits are designated by "CX." Kleiman & Hochberg, Inc.'s exhibits are designated by "RX." Exhibits in the agency record upon which the Chief based his responsibly connected determination as to Michael H. Hirsch, which is part of the record in this proceeding,[2] are designated by "RCMH." Exhibits in the agency record upon which the Chief based his responsibly connected determination as to Barry J. Hirsch, which is part of the record in this

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[1] 7 C.F.R. § 1.145(d).

[2] 7 C.F.R. § 1.136(a).

proceeding,[3] are designated by "RCBH." Transcript references are designated by "Tr."

APPLICABLE STATUTORY PROVISIONS

7 U.S.C.:

TITLE 7—AGRICULTURE

....

CHAPTER 20A—PERISHABLE AGRICULTURAL COMMODITIES

....

§ 499a. Short title and definitions

....

(b) Definitions

For purposes of this chapter:

(9) The term "responsibly connected" means affiliated or connected with a commission merchant, dealer, or broker as (A) partner in a partnership, or (B) officer, director, or holder of more than 10 per centum of the outstanding stock of a corporation or association. A person shall not be deemed to be responsibly connected if the person demonstrates by a preponderance of the evidence that the person was not actively involved in the activities resulting in a violation of this chapter and that the person either was only nominally a partner, officer, director, or shareholder of a violating licensee or entity subject to license or was not an owner of a violating licensee or entity subject to license which was the alter ego of its owners.

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[3] See note 2.

....

§ 499b. Unfair conduct

It shall be unlawful in or in connection with any transaction in interstate or foreign commerce:

....

(4) For any commission merchant, dealer, or broker to make, for a fraudulent purpose, any false or misleading statement in connection with any transaction involving any perishable agricultural commodity which is received in interstate or foreign commerce by such commission merchant, or bought or sold, or contracted to be bought, sold, or consigned, in such commerce by such dealer, or the purchase or sale of which in such commerce is negotiated by such broker; or to fail or refuse truly and correctly to account and make full payment promptly in respect of any transaction in any such commodity to the person with whom such transaction is had; or to fail, without reasonable cause, to perform any specification or duty, express or implied, arising out of any undertaking in connection with any such transaction; or to fail to maintain the trust as required under section 499e(c) of this title. However, this paragraph shall not be considered to make the good faith offer, solicitation, payment, or receipt of collateral fees and expenses, in and of itself, unlawful under this chapter.

....

§ 499d. Issuance of license

(a) Authority to do business; termination; renewal

Whenever an applicant has paid the prescribed fee the Secretary, except as provided elsewhere in this chapter, shall issue to such applicant a license, which shall entitle the licensee to do business as a commission merchant and/or dealer and/or broker unless and until it is suspended or revoked by the Secretary in accordance with the provisions of this chapter, or is automatically suspended under section 499g(d) of this title, but said license shall automatically terminate on the anniversary date of the license at the end of the annual or multiyear period covered by the license fee unless the licensee submits the required renewal application and pays the applicable renewal fee (if such fee is required).

(b) Refusal of license; grounds

The Secretary shall refuse to issue a license to an applicant if he finds that the applicant, or any person responsibly connected with the applicant, is prohibited from employment with a licensee under section 499h(b) of this title or is a person who, or is or was responsibly connected with a person who-

> (A) has had his license revoked under the provisions of section 499h of this title within two years prior to the date of the application or whose license is currently under suspension; [or]

(B) within two years prior to the date of application has been found after notice and opportunity for hearing to have committed any flagrant or repeated violation of section 499b of this title, but this provision shall not apply to any case in which the license of the person found to have committed such violation was suspended and the suspension period has expired or is not in effect[.]

(c) **Issuance of license upon furnishing bond; issuance after three years without bond; effect of termination of bond; increase or decrease in amount; payment of increase**

An applicant ineligible for a license by reason of the provisions of subsection (b) of this section may, upon the expiration of the two-year period applicable to him, be issued a license by the Secretary if such applicant furnishes a surety bond in the form and amount satisfactory to the Secretary as assurance that his business will be conducted in accordance with this chapter and that he will pay all reparation orders which may be issued against him in connection with transactions occurring within four years following the issuance of the license, subject to his right of appeal under section 499g(c) of this title. In the event such applicant does not furnish such a surety bond, the Secretary shall not issue a license to him until three years have elapsed after the date of the applicable order of the Secretary or decision of the court on appeal. If the surety bond so furnished is terminated for any reason without the approval of the Secretary the license shall be automatically

canceled as of the date of such termination and no new license shall be issued to such person during the four-year period without a new surety bond covering the remainder of such period. The Secretary, based on changes in the nature and volume of business conducted by a bonded licensee, may require an increase or authorize a reduction in the amount of the bond. A bonded licensee who is notified by the Secretary to provide a bond in an increased amount shall do so within a reasonable time to be specified by the Secretary, and upon failure of the licensee to provide such bond his license shall be automatically suspended until such bond is provided. The Secretary may not issue a license to an applicant under this subsection if the applicant or any person responsibly connected with the applicant is prohibited from employment with a licensee under section 499h(b) of this title.

§ 499h. Grounds for suspension or revocation of license

(a) Authority of Secretary

Whenever (1) the Secretary determines, as provided in section 499f of this title, that any commission merchant, dealer, or broker has violated any of the provisions of section 499b of this title, or (2) any commission merchant, dealer, or broker has been found guilty in a Federal court of having violated section 499n(b) of this title, the Secretary may publish the facts and circumstances of such violation and/or, by order, suspend the license of such offender for a period not to exceed ninety days, except that, if the violation is flagrant or repeated, the

Secretary may, by order, revoke the license of the offender.

(b) Unlawful employment of certain persons; restrictions; bond assuring compliance; approval of employment without bond; change in amount of bond; payment of increased amount; penalties

Except with the approval of the Secretary, no licensee shall employ any person, or any person who is or has been responsibly connected with any person-

(1) whose license has been revoked or is currently suspended by order of the Secretary;

(2) who has been found after notice and opportunity for hearing to have committed any flagrant or repeated violation of section 499b of this title, but this provision shall not apply to any case in which the license of the person found to have committed such violation was suspended and the suspension period has expired or is not in effect; or

(3) against whom there is an unpaid reparation award issued within two years, subject to his right of appeal under section 499g(c) of this title.

The Secretary may approve such employment at any time following nonpayment of a reparation award, or after one year following the revocation or finding of

flagrant or repeated violation of section 499b of this title, if the licensee furnishes and maintains a surety bond in form and amount satisfactory to the Secretary as assurance that such licensee's business will be conducted in accordance with this chapter and that the licensee will pay all reparation awards, subject to its right of appeal under section 499g(c) of this title, which may be issued against it in connection with transactions occurring within four years following the approval. The Secretary may approve employment without a surety bond after the expiration of two years from the effective date of the applicable disciplinary order. The Secretary, based on changes in the nature and volume of business conducted by the licensee, may require an increase or authorize a reduction in the amount of the bond. A licensee who is notified by the Secretary to provide a bond in an increased amount shall do so within a reasonable time to be specified by the Secretary, and if the licensee fails to do so the approval of employment shall automatically terminate. The Secretary may, after thirty days['] notice and an opportunity for a hearing, suspend or revoke the license of any licensee who, after the date given in such notice, continues to employ any person in violation of this section. The Secretary may extend the period of employment sanction as to a responsibly connected person for an additional one-year period upon the determination that the person has been unlawfully employed as provided in this subsection.

....

(e) Alternative civil penalties

In lieu of suspending or revoking a license under this section when the Secretary determines, as provided by section 499f of this title, that a commission merchant, dealer, or broker has violated section 499b of this title or subsection (b) of this section, the Secretary may assess a civil penalty not to exceed $2,000 for each violative transaction or each day the violation continues. In assessing the amount of a penalty under this subsection, the Secretary shall give due consideration to the size of the business, the number of employees, and the seriousness, nature, and amount of the violation. Amounts collected under this subsection shall be deposited in the Treasury of the United States as miscellaneous receipts.

§ 499p. Liability of licensees for acts and omissions of agents

In construing and enforcing the provisions of this chapter, the act, omission, or failure of any agent, officer, or other person acting for or employed by any commission merchant, dealer, or broker, within the scope of his employment or office, shall in every case be deemed the act, omission, or failure of such commission merchant, dealer, or broker as that of such agent, officer, or other person.

7 U.S.C. §§ 499a(b)(9), 499b(4), 499d(a), (b)(A)-(B), (c), 499h(a)-(b), (e), 499p.

18U.S.C.:

TITLE 18—CRIMES AND CRIMINAL PROCEDURE

PART I—CRIMES

CHAPTER 11—BRIBERY, GRAFT, AND CONFLICTS OF INTEREST

§ 201. Bribery of public officials and witnesses

(a) For the purpose of this section-

(1) the term "public official" means Member of Congress, Delegate, or Resident Commissioner, either before or after such official has qualified, or an officer or employee or person acting for or on behalf of the United States, or any department, agency or branch of Government thereof, including the District of Columbia, in any official function, under or by authority of any such department, agency, or branch of Government, or a juror; [and]

....

(3) the term "official act" means any decision or action on any question, matter, cause, suit, proceeding or controversy, which may at any time be pending, or which may by law be brought before any public official, in such official's official capacity, or in such official's place of trust or profit.

(b) Whoever-

(1) directly or indirectly, corruptly gives, offers or promises anything of value to any public official or person who has been selected to be a public official, or offers or promises any public official or any person who has been selected to be a public official to give anything of value to any other person or entity, with intent-

(A) to influence any official act[.]

....

(2) being a public official or person selected to be a public official, directly or indirectly, corruptly demands, seeks, receives, accepts, or agrees to receive or accept anything of value personally or for any other person or entity, in return for:

(A) being influenced in the performance of any official act;

(B) being influenced to commit or aid in committing, or to collude in, or allow, any fraud, or make opportunity for the commission of any fraud on the United States; or

(C) being induced to do or omit to do any act in violation of the official duty of such official or person; shall be fined under this title or not more than three times the monetary equivalent of the thing of value, whichever is greater,

> or imprisoned for not more than fifteen years, or both, and may be disqualified from holding any office of honor, trust, or profit under the United States.

18 U.S.C. §§ 201(a)(1), (3), (b)(1)(A)(2).

DECISION

Decision Summary

I conclude Kleiman & Hochberg, Inc., willfully, flagrantly, and repeatedly violated section 2(4) of the PACA (7 U.S.C. § 499b(4)), as a consequence of its vice president and owner of 31.6 percent of the outstanding stock of Kleiman & Hochberg, Inc., paying bribes to United States Department of Agriculture inspectors in connection with the inspection of perishable agricultural commodities which Kleiman & Hochberg, Inc., purchased, received, and accepted in interstate or foreign commerce. Based on this conclusion, I revoke Kleiman & Hochberg, Inc.'s PACA license. I also conclude Michael H. Hirsch and Barry J. Hirsch were *responsibly connected*, as defined by section 1(b)(9) of the PACA (7 U.S.C. § 499a(b)(9)), with Kleiman & Hochberg, Inc., when Kleiman & Hochberg, Inc., violated the PACA. Accordingly, Michael H. Hirsch and Barry J. Hirsch are subject to the licensing restrictions under section 4(b) of the PACA and the employment restrictions under section 8(b) of the PACA (7 U.S.C. §§ 499d(b), 499h(b)).

Findings of Fact

(1) Kleiman & Hochberg, Inc., is a New York corporation whose business and mailing address is 226-233 Hunts Point Terminal Market, Bronx, New York 10474 (Answer ¶ 3).

(2) At all times material to this proceeding, Kleiman & Hochberg, Inc., was a licensee under the PACA. PACA license number 108036 was issued to Kleiman & Hochberg, Inc., on June 17, 1947. Kleiman & Hochberg, Inc., has renewed its PACA license annually. (Answer ¶ 3; CX 1.)

(3) William J. Cashin was employed as a produce inspector at the Hunts Point Terminal Market, New York, office of the United States Department of Agriculture, Agricultural Marketing Service, Fresh Products Branch, from July 1979 through August 1999 (Tr. 30).

(4) William Cashin began inspecting produce at Kleiman & Hochberg, Inc., in 1979. At that time, William Cashin dealt with "Seymore," a salesman employed by Kleiman & Hochberg, Inc., who, beginning in the early 1980s, paid William Cashin in connection with the inspection of perishable agricultural commodities for Kleiman &Hochberg, Inc. These payments were not made to the United States Department of Agriculture for normal inspection services, but were payments made to William Cashin personally. (Tr. 38-41.)

(5) After "Seymore" retired from Kleiman & Hochberg, Inc., in the mid 1980s, William Cashin

dealt with John Thomas when he performed inspections at Kleiman & Hochberg, Inc. Beginning in the late 1980s or early 1990s, John Thomas began making payments to William Cashin and other United States Department of Agriculture inspectors in connection with the inspection of perishable agricultural commodities for Kleiman & Hochberg, Inc. John Thomas began by paying United States Department of Agriculture inspectors $25 for each inspection of perishable agricultural commodities, but in the 1990s, John Thomas increased the payments to $50 for each inspection. John Thomas continued making payments to William Cashin in connection with the inspection of perishable agricultural commodities for Kleiman & Hochberg, Inc, until August 4, 1999. These payments were not made to the United States Department of Agriculture for normal inspection services, but were payments made to William Cashin and other United States Department of Agriculture inspectors personally. (Tr. 41-48, 509-18.)

(6) During the time in which John Thomas made payments to William Cashin in connection with the inspection of perishable agricultural commodities for Kleiman & Hochberg, Inc., John Thomas was the vice president and a holder of 31.6 percent of the outstanding stock of Kleiman & Hochberg, Inc. (CX 1; Tr. 41-42, 243).

(7) On March 23, 1999, William Cashin was arrested by agents of the Federal Bureau of Investigation and the United States Department of Agriculture, Office of the Inspector General. After his arrest, William Cashin entered into a cooperation

agreement with the Federal Bureau of Investigation, agreeing to assist the Federal Bureau of Investigation with its investigation into payments to United States Department of Agriculture produce inspectors by PACA licensees located at the Hunts Point Terminal Market. (Tr. 50-52; CX 19.)

(8) With the approval of the Federal Bureau of Investigation and the United States Department of Agriculture, Office of the Inspector General, William Cashin continued to perform his duties as a United States Department of Agriculture produce inspector in the same fashion as before his arrest. William Cashin surreptitiously recorded interactions with individuals at different produce houses using audio, audio/video, or video recording devices. At the end of each day, William Cashin would give Federal Bureau of Investigation agents his tapes, turn in any money he received from PACA licensees, and recount his activities. The Federal Bureau of Investigation agents would prepare a "302" report summarizing what William Cashin told them about that day's activities. (Tr. 51-56; CX 10.)

(9) During the period March 26, 1999, through August 4, 1999, Kleiman & Hochberg, Inc., through John Thomas, Kleiman & Hochberg, Inc.'s vice president and 31.6 percent stockholder, made the following payments to a United States Department of Agriculture produce inspector in connection with 12 inspections of perishable agricultural commodities that Kleiman & Hochberg, Inc., purchased, received, and accepted from eight produce sellers in interstate or foreign commerce:

a. Kleiman & Hochberg, Inc., paid William Cashin, a United States Department of Agriculture produce inspector, $50 in connection with the March 26, 1999, inspection of oranges shipped to Kleiman & Hochberg, Inc., by DNE World Food Sales reflected on United States Department of Agriculture Inspection Certificate Number K-678087-8.

b. Kleiman & Hochberg, Inc., paid William Cashin, a United States Department of Agriculture produce inspector, $50 in connection with the March 26, 1999, inspection of pears shipped to Kleiman & Hochberg, Inc., by Northeast Trading, Inc., reflected on United States Department of Agriculture Inspection Certificate Number K-678088-6.

c. Kleiman & Hochberg, Inc., paid William Cashin, a United States Department of Agriculture produce inspector, $50 in connection with the April 15, 1999, inspection of cantaloups shipped to Kleiman & Hochberg, Inc., by Central American Produce, Inc., reflected on United States Department of Agriculture Inspection Certificate Number K-679411-9.

d. Kleiman & Hochberg, Inc., paid William Cashin, a United States Department of Agriculture produce inspector, $50 in connection with the April 15, 1999, inspection of cantaloups shipped to Kleiman & Hochberg,

Inc., by I. Kunik Co. reflected on United States Department of Agriculture Inspection Certificate Number K-679412-7.

e. Kleiman & Hochberg, Inc., paid William Cashin, a United States Department of Agriculture produce inspector, $50 in connection with the April 20, 1999, inspection of pears shipped to Kleiman & Hochberg, Inc., by Northeast Trading, Inc., reflected on United States Department of Agriculture Inspection Certificate Number K-679420-0.

f. Kleiman & Hochberg, Inc., paid William Cashin, a United States Department of Agriculture produce inspector, $50 in connection with the April 29, 1999, inspection of grapes shipped to Kleiman & Hochberg, Inc., by Fisher Brothers Sales, Inc., reflected on United States Department of Agriculture Inspection Certificate Number K-679825-0.

g. Kleiman & Hochberg, Inc., paid William Cashin, a United States Department of Agriculture produce inspector, $50 in connection with the April 29, 1999, inspection of strawberries shipped to Kleiman & Hochberg, Inc., by Dole Fresh Vegetables, Inc., reflected on United States Department of Agriculture Inspection Certificate Number K-680301-9.

h. Kleiman & Hochberg, Inc., paid William Cashin, a United States Department of Agriculture produce inspector, $50 in

connection with the May 28, 1999, inspection of cherry tomatoes shipped to Kleiman & Hochberg, Inc., by Northeast Trading, Inc., reflected on United States Department of Agriculture Inspection Certificate Number K-766208-3.

i. Kleiman & Hochberg, Inc., paid William Cashin, a United States Department of Agriculture produce inspector, $50 in connection with the May 28, 1999, inspection of cherry tomatoes shipped to Kleiman & Hochberg, Inc., by Northeast Trading, Inc., reflected on United States Department of Agriculture Inspection Certificate Number K-766209-1.

j. Kleiman & Hochberg, Inc., paid William Cashin, a United States Department of Agriculture produce inspector, $50 in connection with the June 16, 1999, inspection of cantaloups shipped to Kleiman & Hochberg, Inc., by Robert Ruiz, Inc., reflected on United States Department of Agriculture Inspection Certificate Number K-767028-4.

k. Kleiman & Hochberg, Inc., paid William Cashin, a United States Department of Agriculture produce inspector, $50 in connection with the June 16, 1999, inspection of cherry tomatoes shipped to Kleiman & Hochberg, Inc., by Northeast Trading, Inc., reflected on United States

Department of Agriculture Inspection Certificate Number K-767030-0.

l. Kleiman & Hochberg, Inc., paid William Cashin, a United States Department of Agriculture produce inspector, $50 in connection with the August 4, 1999, inspection of sweet cherries shipped to Kleiman & Hochberg, Inc., by Stemilt Growers, Inc., reflected on United States Department of Agriculture Inspection Certificate Number K-769886-3.

(Tr. 61-70; CX 10-CX 18; RX A-RX L.)

10. On October 21, 1999, the United States District Court for the Southern District of New York filed an indictment in which the grand jury charged John Thomas with seven counts of bribery of a public official in violation of 18 U.S.C. § 201(b). The indictment charges that John Thomas:

> [U]nlawfully, wilfully, knowingly, directly and indirectly, did corruptly give, offer and promise things of value to a public official, with intent to influence official acts, to wit, JOHN THOMAS, the defendant, made cash payments to a United States Department of Agriculture produce inspector in order to influence the outcome of inspections of fresh fruit and vegetables conducted at Kleiman &

Hochberg, Inc., Hunts Point Terminal Market, Bronx, New York, as specified below:

COUNT	DATE	AMOUNT OF BRIBE
ONE	3/26/99	$100
TWO	4/19/99	$100
THREE	4/22/99	$50
FOUR	4/29/99	$100
FIVE	5/28/99	$100
SIX	6/24/99	$50
SEVEN	8/5/99	$50

(Title 18, United States Code, Sections 201(b)(1)(A) and 2.) CX8A.

The bribes charged in the indictment cover the payments John Thomas made to William Cashin in connection with the 12 inspections of perishable agricultural commodities identified in Finding of Fact 9. (CX 10-CX 18.)

11. On October 17, 2001, John Thomas pled guilty to one count in an information which superceded the indictment referred to in Finding of Fact 10. Specifically, John Thomas pled guilty to bribery of public officials (18 U.S.C. § 201(b)).

(CX 9.) The superceding information to which John Thomas pled guilty states, as follows:

> From in or about 1990 through on or about October 27, 1999, in the Southern District of New York, JOHN THOMAS, the defendant, unlawfully, wilfully, knowingly,

> directly and indirectly, did corruptly give, offer and promise things of value to public officials, with intent to influence official acts, to wit, JOHN THOMAS, the defendant, made cash payments to United States Department of Agriculture produce inspectors in order to obtain expedited inspections of fresh fruit and vegetables conducted at Kleiman & Hochberg, Inc., Hunts Point Terminal Market, Bronx, New York.
>
> (Title 18, United States Code, Sections 201(b)(1)(A) and 2.)

CX 8 at 2. John Thomas was sentenced to 2 years' probation and a $10,000 fine (CX 9).

12. During the period in which John Thomas paid bribes to William Cashin, Michael H. Hirsch was the president, a director, and a holder of 31.6 percent of the outstanding stock of Kleiman & Hochberg, Inc. (Tr. 1278; CX 1; RCMH 1).

13. During the period in which John Thomas paid bribes to William Cashin, Michael H. Hirsch was actively involved in the day-to-day management of Kleiman & Hochberg, Inc. Michael H. Hirsch's active involvement in the management of Kleiman & Hochberg, Inc., included the purchase, sale, and examination of perishable agricultural commodities; "[taking] care of credit, accounts receivable, and general daily problems of the business"; responsibility for inventory; applying for United States Department of Agriculture inspections

of perishable agricultural commodities; interacting with United States Department of Agriculture produce inspectors; dealing with companies that shipped perishable agricultural commodities to Kleiman & Hochberg, Inc.; making price-after-sale arrangements with shippers of perishable agricultural commodities; reviewing and sending accountings to shippers; establishing procedures for the daytime operation of Kleiman & Hochberg, Inc.; ensuring that Kleiman & Hochberg, Inc., was run "smoothly" and "properly"; and, along with Barry J. Hirsch, running the daytime operations of Kleiman & Hochberg, Inc. (Tr. 1189, 1220, 1265-67, 1270-72, 1277-78.)

14. During the period . which John Thomas paid bribes to William Cashin, Michael H. Hirsch was usually at Kleiman & Hochberg, Inc.'s place of business from 7:30 a.m. to between 4:00 p.m. and 6:00 p.m. (Tr. 1266).

15. Michael H. Hirsch had no knowledge that John Thomas paid bribes to William Cashin or any other United States Department of Agriculture produce inspector in connection with the inspection of perishable agricultural commodities for Kleiman & Hochberg, Inc. (Tr. 519, 1267-69, 1274-75).

16. During the period in which John Thomas paid bribes to William Cashin, Barry J. Hirsch was the treasurer and a holder of 31.6 percent of the outstanding stock of Kleiman & Hochberg, Inc. (Tr. 1181, 1214-15; CX 1; RCBH 1).

17. During the period in which John Thomas paid bribes to William Cashin, Barry J. Hirsch was actively involved in the day-to-day management of Kleiman & Hochberg, Inc. Barry J. Hirsch's active involvement in the management of Kleiman & Hochberg, Inc., included checking on the inventory of perishable agricultural commodities; ensuring that the inventory of perishable agricultural commodities was properly stored and rotated; buying, selling, and examining perishable agricultural commodities; establishing procedures for the daytime operation of Kleiman & Hochberg, Inc.; monitoring the activities of Kleiman & Hochberg, Inc., employees; ensuring that shippers of perishable agricultural commodities were paid promptly; settling disputed claims with shippers; applying for United States Department of Agriculture inspections of perishable agricultural commodities; examining accountings sent to shippers; ensuring that Kleiman & Hochberg, Inc., was run "smoothly" and "properly"; and, along with Michael H. Hirsch, running the daytime operations of Kleiman & Hochberg, Inc. (Tr. 1181-82, 1189-95, 1208-11, 1215-22.)

18. Barry J. Hirsch had no knowledge that John Thomas paid bribes to William Cashin or any other United States Department of Agriculture produce inspector in connection with the inspection of perishable agricultural commodities for Kleiman & Hochberg, Inc. (Tr. 519, 1198-1205, 1211-14).

Conclusions of Law

1. Pursuant to section 16 of the PACA (7 U.S.C. § 499p), John Thomas' payments of bribes to United States Department of Agriculture produce inspectors are deemed the acts of Kleiman & Hochberg, Inc.

2. Kleiman & Hochberg, Inc., engaged in willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) by failing, without reasonable cause, to perform an implied duty arising out of an undertaking in connection with transactions involving perishable agricultural commodities purchased, received, and accepted in interstate or foreign commerce.

3. Michael H. Hirsch was *responsibly connected,* as defined by section 1(b)(9) of the PACA (7 U.S.C. § 499a(b)(9)), with Kleiman & Hochberg, Inc., during the period when Kleiman & Hochberg, Inc., willfully, flagrantly, and repeatedly violated section 2(4) of the PACA (7 U.S.C. § 499b(4)).

4. Barry J. Hirsch was *responsibly connected,* as defined by section 1(b)(9) of the PACA (7 U.S.C. § 499a(b)(9)), with Kleiman & Hochberg, Inc., during the period when Kleiman & Hochberg, Inc., willfully, flagrantly, and repeatedly violated section 2(4) of the PACA (7 U.S.C. § 499b(4)).

Discussion

I. Kleiman & Hochberg, Inc., Willfully, Flagrantly, and Repeatedly Violated the PACA

A. John Thomas, an Officer and Major Stockholder of Kleiman & Hochberg, Inc., Paid Bribes to United States Department of Agriculture Produce Inspectors

Both John Thomas and William Cashin freely acknowledged that John Thomas made $50 payments to William Cashin in connection with 12 inspections of perishable agricultural commodities that Kleiman & Hochberg, Inc., purchased, received, and accepted from produce sellers. There was no dispute that these 12 payments were representative of a long-standing practice that went back until the late 1980s or early 1990s. John Thomas even testified that he paid William Cashin an additional $150 for three inspections of perishable agricultural commodities that were not included in the Complaint. It is likewise undisputed that John Thomas was the vice president of Kleiman & Hochberg, Inc., and a holder of 31.6 percent of the outstanding stock of Kleiman & Hochberg, Inc., at the time he paid William Cashin and other United States Department of Agriculture produce inspectors. (CX 1; Tr. 41-48, 243, 509-18.)

B. Kleiman & Hochberg, Inc., is Liable for John Thomas' Bribery

The relationship between a PACA licensee and persons acting for or employed by the PACA licensee is governed by section 16 of the PACA (7 U.S.C. § 499p) which provides, in construing and enforcing the PACA, the act of any agent, officer, or other person acting for or employed by any commission merchant, dealer, or broker, within the scope of his or her employment or office, shall in every case be deemed the act of the commission merchant, dealer, or broker as that of the agent, officer, or other person. Essentially, section 16 of the PACA (7 U.S.C. § 499p) provides an identity of action between a PACA licensee and the PACA licensee's agents and employees.

John Thomas, the vice president and a holder of 31.6 percent of the outstanding stock of Kleiman & Hochberg, Inc., testified that he paid bribes to United States Department of Agriculture produce inspectors in order to ensure United States Department of Agriculture inspections of perishable agricultural commodities for Kleiman & Hochberg, Inc., were not delayed (Tr. 509-12). John Thomas stated the money used to pay the bribes came out of his own pocket (Tr. 547). John Thomas also stated, and Michael H. Hirsch and Barry J. Hirsch confirmed, that John Thomas acted without Michael H. Hirsch's or Barry J. Hirsch's knowledge or approval (Tr. 519, 1198-1205, 1211-14, 1267-69, 1274-75). However, the purpose behind the bribes, even as expressed by John Thomas, was to benefit Kleiman & Hochberg, Inc., as the alleged threat of delayed United States

Department of Agriculture produce inspections would harm Kleiman & Hochberg, Inc., as an entity. Even though John Thomas, as a nearly one-third owner of Kleiman & Hochberg, Inc., would obviously share in any benefit that Kleiman & Hochberg, Inc., received, it is evident that the bribes were designed to benefit Kleiman & Hochberg, Inc., in the conduct of its business. As long as John Thomas was acting within the scope of his employment, which he clearly was, acts committed by him are deemed to be acts committed by Kleiman & Hochberg, Inc. Thus, as a matter of law, the knowing and willful bribes by John Thomas are deemed to be knowing and willful bribes by Kleiman & Hochberg, Inc.[4]

Even if Michael H. Hirsch and Barry J. Hirsch were unaware of John Thomas' payment of bribes, the absence of actual knowledge is insufficient to rebut the burden imposed by section 16 of the PACA (7 U.S.C. § 499p). As a matter of law, violations by an officer and owner are violations by the employer even if the employer's other officers and owners had no actual knowledge of the violations and would not

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[4] *Post & Taback, Inc. v. Department ofAgric.*, 123 Fed. Appx. 406, 408 (D.C. Cir. 2005); *H.C. MacClaren, Inc. v. United States Dep 't ofAgric.*, 342 F.3d 584, 591 (6th Cir. 2003); *In reM. Trombetta & Sons, Inc.*, 64 Agric. Dec.___, slip op. at 20-21 (Sept. 27, 2005); *InreG &T Terminal Packaging Co.*, 64 Agric. Dec.___, slip op. at 15 (Sept. 8, 2005), *appeal docketed*, No. 05-5634 (2d Cir. Oct. 18, 2005); *In re Geo. A. Heimos Produce Co.*, 62 Agric. Dec. 763, 782-83 (2003), *appeal dismissed*, No. 03-4008 (8th Cir. Aug. 31, 2004); *In re The Produce Place*, 53 Agric. Dec. 1715, 1761-63 (1994), *aff'd*, 91 F.3d 173 (D.C. Cir. 1996), *cert. denied*, 519 U.S. 1116 (1997); *In re Jacobson Produce, Inc.* (Decision as to Jacobson Produce, Inc.), 53 Agric. Dec. 728, 754 (1994), *appeal dismissed*, No. 94-4118 (2d Cir. Apr. 16, 1996).

have condoned them.[5] The clear language of section 16 of the PACA (7 U.S.C. § 499p) would be defeated by any other interpretation.

C. Bribery of United States Department of Agriculture Produce Inspectors Violates the PACA

The PACA does not expressly provide that a payment to a United States Department of Agriculture produce inspector in connection with the inspection of perishable agricultural commodities is a violation of the PACA. However, the PACA provides that it is unlawful for any commission merchant, dealer, or broker: (1) to make, for a fraudulent purpose, any false or misleading statement in connection with any transaction involving any perishable agricultural commodity; (2) to fail or refuse truly and correctly to account and to make full payment promptly with respect to any transaction involving any perishable agricultural commodity; and (3) to fail, without reasonable cause, to perform any specification or duty, express or implied, arising out of any undertaking in connection with any transaction involving any perishable agricultural commodity.[6]

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[5] *See In re Post & Taback, Inc.*, 62 Agric. Dec. 802, 821 (2003) (stating, pursuant to the PACA, knowing and willful violations by an employee are deemed to be knowing and willful violations of the employing PACA licensee, even if the PACA licensee's officers, directors, and owners had no actual knowledge of the violations), *aff'd*, 123 Fed. Appx. 406 (D.C. Cir. 2005).

[6] 7 U.S.C. § 499b(4).

John Thomas testified he bribed United States Department of Agriculture produce inspectors as alleged in the Complaint, but contends he paid the bribes only to obtain prompt inspections of Kleiman & Hochberg, Inc.'s perishable agricultural commodities (Tr. 509-12). Even if John Thomas only bribed United States Department of Agriculture inspectors in exchange for prompt inspections, Kleiman & Hochberg, Inc., violated section 2(4) of the PACA (7 U.S.C. § 499b(4)).

Bribery of a United States Department of Agriculture produce inspector, whatever the motive, in and of itself negates, or gives the appearance of negating, the impartiality of the United States Department of Agriculture produce inspector and undermines the confidence that produce industry members and consumers place in quality and condition determinations rendered by the United States Department of Agriculture produce inspector. Commission merchants, dealers, and brokers have a duty to refrain from making payments to United States Department of Agriculture produce inspectors in connection with the inspection of perishable agricultural commodities which will or could undermine the trust produce sellers place in the accuracy of United States Department of Agriculture inspection certificates and the integrity of United States Department of Agriculture produce inspectors. A PACA licensee's payment to a United States Department of Agriculture produce inspector, even if it is only to obtain prompt inspection of perishable agricultural commodities, undermines the trust produce sellers place in the accuracy of the United States Department of Agriculture inspection

certificate and the integrity of the United States Department of Agriculture produce inspector. I have consistently interpreted section 2(4) of the PACA (7 U.S.C. § 499b(4)) to prohibit payment of bribes to United States Department of Agriculture produce inspectors.[7]

D. Kleiman & Hochberg, Inc. 's PACA Violations Were Willful, Flagrant, and Repeated

A violation is willful if, irrespective of evil motive or erroneous advice, a person intentionally does an act prohibited by statute or carelessly disregards the requirements of a statute.[8] John

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[7] *In reM. Trombetta & Sons, Inc.,* 64 Agric. Dec.___(Sept. 27, 2005); *In re G & T Terminal Packaging Co.,* 64 Agric. Dec.___(Sept. 8, 2005), *appeal docketed,* No. 05-5634 (2d Cir. Oct. 18, 2005); *In re Post & Taback, Inc.,* 62 Agric. Dec. 802 (2003), *aff'd,* 123 Fed. Appx. 406 (D.C. Cir. 2005).

[8] *See, e.g., Allred's Produce v. United States Dep 't of Agric.,* 178 F.3d 743, 748 (5th Cir. 1999); *Toneyv. Glickman,* 101 F.3d 1236, 1241 (8th Cir. 1996); *Potato Sales Co. v. Dep't of Agric.,* 92 F.3d 800, 805 (9th Cir. 1996); *Cox v. United States Dep't of Agric.,* 925 F.2d 1102, 1105 (8th Cir. 1991), *cert. denied,* 502 U.S. 860 (1991); *Finer Foods Sales Co. v. Block,* 708 F.2d 774, 777-78 (D.C. Cir. 1983); *American Fruit Purveyors, Inc. v. United States,* 630 F.2d 370, 374 (5th Cir. 1980) (per curiam), *cert, denied,* 450 U.S. 997 (1981); *George Steinberg & Son, Inc. v. Butz,* 491 F.2d 988, 994 (2d Cir.), *cert. denied,* 419 U.S. 830 (1974); *Goodman v. Benson,* 286 F.2d 896, 900 (7th Cir. 1961); *Eastern Produce Co. v. Benson,* 278 F.2d 606, 609 (3d Cir. 1960); *In re Post & Taback, Inc.,* 62 Agric. Dec. 802, 828 (2003), *aff'd,* 123 Fed. Appx. 406 (D.C. Cir. 2005); *In re JSG Trading Corp.* (Rulings as to JSG Trading Corp. Denying: (1) Motion to Vacate; (2) Motion to Reopen; (3) Motion for Stay; (4) Request for Pardon or Lesser Sanction), 61 Agric. Dec. 409, 430 (2002); *In re PMD Produce Brokerage Corp.* (Decision and Order on

Remand), 60 Agric. Dec. 780, 789 (2001), *aff'd,* No. 02-1134, 2003 WL 21186047 (D.C. Cir. May 13, 2003); *In reH.C. MacClaren, Inc.,* 60 Agric. Dec. 733, 755 (2001), *aff'd,* 342 F.3d 584 (6th Cir. 2003); *In re Sunland Packing House Co.,* 58 Agric. Dec. 543, 593 (1999); *In re Western Sierra Packers, Inc.,* 57 Agric. Dec. 1578, 1602 (1998); *In re Limeco, Inc.,* 57 Agric. Dec. 1548, 1560 (1998), *appeal dismissed,* No. 98-5571 (11th Cir. Jan. 28, 1999); *In re Queen City Farms, Inc.,* 57 Agric. Dec. 813, 827 (1998), *appeal dismissed sub nom. Litvin v. United States Dep't of Agric.,* No. 98-1991 (1st Cir. Nov. 9, 1998); *In re Scamcorp, Inc.,* 57 Agric. Dec. 527, 552, (1998); *In re Tolar Farms,* 56 Agric. Dec. 1865, 1879 (1997), *appeal dismissed,* No. 98-5456 (1 1th Cir. July 39, 1999); *In re Kanowitz Fruit & Produce, Co.,* 56 Agric. Dec. 917, 925 (1997), *aff'd,* 166 F.3d 1200 (Table), 1998 WL 863340 (2d Cir. 1998), *cert, denied,* 526 U.S. 1098 (1999); *In re Five Star Food Distributors, Inc.,* 56 Agric. Dec. 880, 895-96 (1997); *In re Havana Potatoes of New York Corp.,* 55 Agric. Dec. 1234, 1244 (1996), *aff'd,* 136 F.3d 89 (2d Cir. 1997); *In reAndershock's Fruitland, Inc.,* 55 Agric. Dec. 1204, 1232-33 (1996), *aff'd,* 151 F.3d 735 (7th Cir. 1998); *In re Hogan Distrib., Inc.,* 55 Agric. Dec. 622, 626 (1996); *In re Moreno Bros.,* 54 Agric. Dec. 1425, 1432 (1995); *In re Granoff's Wholesale Fruit & Produce, Inc.,* 54 Agric. Dec. 1375, 1378 (1995); *In re Midland Banana & Tomato Co.,* 54 Agric. Dec. 1239, 1330 (1995), *aff'd,* 104 F.3d 139 (8th Cir. 1997), *cert. denied sub nom. Heimann v. Department ofAgric.* 522 U.S. 951 (1997); *In re National Produce Co.,* 53 Agric. Dec. 1622, 1625 (1994); *In re Samuel S. Napolitano Produce, Inc.,* 52 Agric. Dec. 1607, 1612 (1993). *See also Butz v. Glover Livestock Comm'n Co.,* 411 U.S. 182, 187 n.5 (1973) ("'Wilfully' could refer to either intentional conduct or conduct that was merely careless or negligent."); *United States v. Illinois Central R.R.,* 303 U.S. 239, 242-43 (1938) ("In statutes denouncing offenses involving turpitude, 'willfully' is generally used to mean with evil purpose, criminal intent or the like. But in those denouncing acts not in themselves wrong, the word is often used without any such implication. Our opinion in *United States v. Murdock,* 290 U.S. 389, 394, shows that it often denotes that which is 'intentional, or knowing, or voluntary, as distinguished from accidental,' and that it is employed to characterize 'conduct marked by careless disregard whether or not one has the right so to act.'")

Thomas, and therefore Kleiman & Hochberg, Inc., knew the bribes paid to William Cashin in the 12 inspections involved in this proceeding, as well as the countless additional payments over the previous decade, were illegal, but essentially decided that he needed to make these payments for the benefit of Kleiman & Hochberg, Inc. Clearly, John Thomas made a business decision to violate the PACA, rather than to pursue alternative measures. Kleiman & Hochberg, Inc.'s payments to United States Department of Agriculture produce inspectors were clearly intentional.

Likewise, Kleiman & Hochberg, Inc.'s violations were "flagrant." A violation of law is flagrant if it is "conspicuously bad or objectionable" or so bad that it "can neither escape notice nor be condoned."[9] The payment of a bribe to a United States Department of Agriculture produce inspector in connection with the inspection of perishable agricultural commodities is a conspicuously bad and objectionable act that cannot escape notice or be condoned because, as discussed in this Decision and

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The United States Court of Appeals for the Fourth Circuit and the United States Court of Appeals for the Tenth Circuit define the word "willfulness," as that word is used in 5 U.S.C. § 558(c), as an intentional misdeed or such gross neglect of a known duty as to be the equivalent of an intentional misdeed. *Capital Produce Co. v. United States,* 930 F.2d 1077, 1079 (4th Cir. 1991); *Hutto Stockyard, Inc. v. United States Dep 't of Agric.,* 903 F.2d 299, 304 (4th Cir. 1990); *Capitol Packing Co. v. United States,* 350 F.2d 67, 78-79 (10th Cir. 1965). Even under this more stringent definition, Kleiman & Hochberg, Inc.'s violations were willful.

[9] Merriam-Webster's Collegiate Dictionary 441 (10th ed. 1997).

Order, *supra,* it undermines the trust produce sellers place in the accuracy of the United States Department of Agriculture inspection certificate and the integrity of the United States Department of Agriculture produce inspector. The long-standing practice of Kleiman & Hochberg, Inc., bribing William Cashin and other United States Department of Agriculture produce inspectors, easily meets the definition of flagrant under applicable case law.

Moreover, I conclude, as a matter of law, Kleiman & Hochberg, Inc.'s violations are repeated because repeated means more than one.[10] John Thomas paid William Cashin and other United States Department of Agriculture produce inspectors multiple bribes in connection with numerous

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[10] *See, e.g., Allred's Produce v. United States Dep't ofAgric.,* 178 F.3d 743, 748 (5th Cir. 1999) (stating violations are repeated under the PACA if they are not done simultaneously); *Farley & Calfee v. United States Dep't ofAgric.,* 941 F.2d 964, 968 (9th Cir. 1991) (holding 51 violations of the payment provisions of the PACA fall plainly within the permissible definition of repeated); *Melvin Beene Produce Co. v. Agricultural Mktg. Serv.,* 728 F.2d 347, 351 (6th Cir. 1984) (holding 227 transactions occurring over a 14-month period to be repeated violations of the PACA); *Wayne Cusimano, Inc. v. Block,* 692 F.2d 1025, 1029 (5th Cir. 1982) (holding 150 transactions occurring over a 15-month period involving over $135,000 to be frequent violations of the payment provisions of the PACA); *Reese Sales Co. v. Hardin,* 458 F.2d 183, 187 (9th Cir. 1972) (finding 26 violations of the payment provisions of the PACA involving $19,059.08 occurring over 2¾ months to be repeated); *Zwicky. Freeman,* 373 F.2d 110, 115 (2d Cir.) (concluding, because the 295 violations of the payment provisions of the PACA did not occur simultaneously, they must be considered "repeated" violations within the context of the PACA), *cert. denied,* 389 U.S. 835 (1967).

inspections of perishable agricultural commodities over approximately a 10-year period.

Thus, I conclude Kleiman & Hochberg, Inc., committed willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)).

II. The Appropriate Sanction Against Kleiman & Hochberg, Inc., Is License Revocation

John A. Koller, a senior marketing specialist employed by the PACA Branch, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture, testified that bribery of United States Department of Agriculture produce inspectors is such a serious violation of the PACA that a severe sanction is necessary as a deterrent and that the United States Department of Agriculture recommends PACA license revocation as the only adequate sanction. Mr. Koller explained the United States Department of Agriculture's recommendation for PACA license revocation as follows:

[BY MR. KENDALL:]

Q. Are you aware of the sanction Complainant recommends in this case?

[BY MR. KOLLER:]

A. Yes, I am.

Q. How are you aware of it?

A. I participated in development of the sanction recommendation.

Q. Have you heard the evidence presented at this hearing for this point?

A. Yes, I have.

Q. Are you now prepared to provide Complainant's sanction recommendation in this case?

A. Yes.

Q. At this point what is the sanction recommendation in this case?

A. That would be a license revocation.

Q. What's the basis for Complainant's sanction recommendation?

A. The basis of Complainant's sanction recommendation is on various factors. One of the factors is that bribery payments did occur. As an aggregate factor Mr. Thomas' plea and Mr. Cashin's testimony shows that the bribery payments occurred as far back as 1990. The role of the inspection certificate as another factor is relied upon on the industry in terms of being able to resolve contract disputes quickly.

Approximately 150,000 inspections are performed each year by the Fresh Products Branch. It is important that - and essential that the

information that is reflected on these inspections are accurate and impartial. If there's any indication or any suspicion that the inspection has been tainted because of a bribery payment being made in order to obtain false information on the inspection undermines the role of that certificate.

If there's any question about the credibility of inspection and the process in which that inspection was performed in terms of how it reflects an impartial review in terms of the quality and condition of the product, would undermine the whole process and be disruptive.

If there's a question about that on the part of the shipper in terms of the reliability of the inspection would be detrimental to the whole process, and affect how disputes are resolved - hundreds of disputes are resolved - each day. As well as resolving thousands of dollars in unjustified pr e adjustments.

Another factor is where you have a wholesaler who's paying bribes to a produce inspector to obtain false information. Other wholesalers may feel that they have to make bribery payments as well. For example, what I mean by that is if you have a wholesaler on the market - on Hunts Point Market - who is making bribery payments to a produce inspector and they are able to use the results of that inspection to negotiate price adjustments to the transaction related to that inspection that would lower prices, then they would be in a position to sell the product at a lesser price. When you have other wholesalers on the market who

would be selling the same product see that this is the only way that they can compete is by making bribery payments to a produce inspector, they may feel that that's what they'll have to do.

This would have an affect on the whole market in terms of its credibility, whether you've got firms that - where you have firms making bribery payments, but also in terms of firms that aren't making bribery payments, it would affect them.

Also, the Department, for this type of violation, a strong sanction of license revocation is - would be appropriate in this case. Because not only would it deter Respondent, but it would also deter other members of the industry from contemplating making a serious violation such as that of making bribery payments to a produce inspector.

Q. Does the fact that it was Mr. Cashin, a USDA employee, who received the bribes, have any effect on Complainant's sanction recommendation?

A. No.

Q. Why not?

A. The Department believes that this violation is a serious violation under the PACA. That whether these bribery payments - in terms of bribery payments, whether these bribery payments were made to someone else in the industry or whether the bribery payments were made to a produce inspector,

a violation of the Respondent making these bribery payments does not excuse that firm from that violation.

Q. Does Complaint recommend a civil penalty in this case as an alternative to license revocation?

A. No.

Q. Why not?

A. In terms of the seriousness of this violation a civil penalty would not be appropriate. By making bribery payments to a produce inspector is a serious violation and it affects the industry as a whole. A license revocation would be a revocation to seek - and, also, the industry needs to be put on notice that making bribery payments is not something that can be allowed.

Also, it has been consistent policy of the Department to recommend a license revocation in the situations where you have a serious violation of bribery payments taking place.

Tr. 349-53.

I find John Thomas' payment of bribes to United States Department of Agriculture produce inspectors within the scope of his employment are deemed to be the actions of Kleiman & Hochberg, Inc., and those bribes were so egregious that nothing less than PACA license revocation is an adequate sanction. In every previous case that has come before

me in which a PACA licensee has paid bribes or illegal gratuities to United States Department of Agriculture produce inspectors in connection with the inspection of perishable agricultural commodities in violation of the PACA, I imposed the maximum sanction of either licence revocation or publication of the facts and circumstances of the violations.[11] While sanctions in similar cases are not required to be uniform,[12] I find no reason to depart from my normal practice of imposing the maximum sanction in this proceeding.

III. Michael H. Hirsch and Barry J. Hirsch Were Responsibly Connected

The term *responsibly connected* means affiliated or connected with a commission merchant, dealer, or broker as a partner in a partnership or as an officer, a director, or a holder of more than 10 percent of the outstanding stock of a corporation or association.[13] The record establishes Michael H. Hirsch was the president, a director, and a holder of 31.6 percent of the outstanding stock of Kleiman &

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[11] *In reM. Trombetta & Sons, Inc.*, 64 Agric. Dec.___(Sept. 27, 2005); *In re G & T Terminal Packaging Co.*, 64 Agric. Dec.___(Sept. 8, 2005), *appeal docketed*, No. 05-5634 (2d Cir. Oct. 18, 2005); *In re Post & Taback, Inc.*, 62 Agric. Dec. 802 (2003), *aff'd*, 123 Fed. Appx. 406 (D.C. Cir. 2005).

[12] *Harry Klein Produce Corp. v. United States Dep 't of Agric.*, 831 F.2d 403, 407 (2d Cir. 1987); *American Fruit Purveyors, Inc. v. United States*, 630 F.2d 370, 374 (5th Cir. 1980) (per curiam), *cert. denied*, 450 U.S. 997 (1981); *In re Limeco, Inc.*, 57 Agric. Dec. 1548, 1572 (1998), *appeal dismissed*, No. 98-5571 (11th Cir. Jan. 28, 1999).

[13] 7 U.S.C. §499a(b)(9).

Hochberg, Inc., during the period when Kleiman & Hochberg, Inc., willfully, flagrantly, and repeatedly violated section 2(4) of the PACA (7 U.S.C. § 499b(4)). The record also establishes Barry J. Hirsch was the treasurer and a holder of 31.6 percent of the outstanding stock of Kleiman & Hochberg, Inc., during the period when Kleiman & Hochberg, Inc., willfully, flagrantly, and repeatedly violated section 2(4) of the PACA (7 U.S.C. § 499b(4)). The burden is on Michael H. Hirsch and Barry J. Hirsch to demonstrate by a preponderance of the evidence that they were not responsibly connected with Kleiman & Hochberg, Inc., despite their positions at, and ownership of, Kleiman & Hochberg, Inc.

Section 1(b)(9) of the PACA (7 U.S.C. § 499a(b)(9)) provides a two-pronged test which a petitioner must meet in order to demonstrate that he or she was not responsibly connected. First, a petitioner must demonstrate by a preponderance of the evidence that he or she was not actively involved in the activities resulting in a violation of the PACA. If a petitioner satisfies the first prong, then for the second prong, the petitioner must demonstrate by a preponderance of the evidence one of two alternatives: (1) the petitioner was only nominally a partner, an officer, a director, or a shareholder of the violating PACA licensee or entity subject to a PACA license; or (2) the petitioner was not an owner of the violating PACA licensee or entity subject to a PACA license, which was the alter ego of its owners.

The United States Department of Agriculture's standard for determining whether a petitioner is actively involved in the activities resulting in a

violation of the PACA was first set forth *in In re Michael Norinsberg,* 58 Agric. Dec. 604, 610-11 (1999) (Decision and Order on Remand), as follows:

> The standard is as follows: A petitioner who participates in activities resulting in a violation of the PACA is actively involved in those activities, unless the petitioner demonstrates by a preponderance of the evidence that his or her participation was limited to the performance of ministerial functions only. Thus, if a petitioner demonstrates by a preponderance of the evidence that he or she did not exercise judgment, discretion, or control with respect to the activities that resulted in a violation of the PACA, the petitioner would not be found to have been actively involved in the activities that resulted in a violation of the PACA and would meet the first prong of the responsibly connected test.

I find Michael H. Hirsch carried his burden of proof that he was not actively involved in the activities resulting in Kleiman & Hochberg, Inc.'s willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)). I also find Barry J. Hirsch carried his burden of proof that he was not actively involved in the activities resulting in Kleiman & Hochberg, Inc.'s willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)). However, I find Michael H. Hirsch failed to carry his burden of proof that he was only nominally an officer, a director, and a holder of 31.6 percent of the outstanding stock of Kleiman &

Hochberg, Inc. I also find Barry J. Hirsch failed to carry his burden of proof that he was only nominally an officer and a holder of 31.6 percent of the outstanding stock of Kleiman & Hochberg, Inc.

In order for a petitioner to demonstrate that he or she was only nominally an officer, a director, or a holder of more than 10 percent of the outstanding stock of a corporation, the petitioner must demonstrate by a preponderance of the evidence that he or she did not have an actual, significant nexus with the violating company during the violation period. Under the actual, significant nexus standard, responsibilities are placed upon corporate officers, directors, and shareholders, even though they may not actually have been actively involved in the activities resulting in violations of the PACA, because their status with the company requires that they knew, or should have known, about the violations being committed and failed to counteract or obviate the fault of others.[14]

The record establishes Michael H. Hirsch and Barry J. Hirsch each had an actual, significant nexus with Kleiman & Hochberg, Inc., during the violation period. Michael H. Hirsch and Barry J. Hirsch assert they actively managed Kleiman & Hochberg, Inc., when Kleiman & Hochberg, Inc., violated the

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[14] *Bell v. Department ofAgric.*, 39 F.3d 1199, 1201 (D.C. Cir. 1994); *Minotto v. United States Dep 't ofAgric., 711* F.2d 406, 408-09 (D.C. Cir. 1983); *Quinn v. Butz*, 510 F.2d 743, 756 n.84 (D.C. Cir. 1975).

PACA.[15] This fact refutes any possible contention that either Michael H. Hirsch or Barry J. Hirsch could prove he was not responsibly connected by demonstrating he was only nominal. Under the statutory definition of the term *responsibly connected,* the fact that Michael H. Hirsch and Barry J. Hirsch were not actively involved in the activities resulting in Kleiman & Hochberg, Inc.'s violations of the PACA does not exonerate them unless they also prove by a preponderance of the evidence that their positions at, and ownership of, Kleiman & Hochberg, Inc., were nominal. Michael H. Hirsch has not established by a preponderance of the evidence that he was only nominally the president, a director, and a holder of 31.6 percent of the outstanding stock of Kleiman & Hochberg, Inc. Barry J. Hirsch has not established by a preponderance of the evidence that he was only nominally the treasurer and a holder of 31.6 percent of the outstanding stock of Kleiman & Hochberg, Inc.

Agricultural Marketing Service's and the Chief's Appeal Petition

The Agricultural Marketing Service and the Chief raise two issues in "Complainant's and

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[15] See Petitioners' Brief and Supplemental Proposed Findings of Fact, Conclusions of Law, and Order at 1 (stating in proposed finding of fact 1 "Barry Hirsch was the Treasurer and 32% stockholder of Kleiman & Hochberg, Inc., and in active management of the company during the period covered by the Complaint in PACA Docket No. D-02-0021"; stating in proposed finding of fact 2 "Michael Hirsch was the President and 32% stockholder of Kleiman & Hochberg, Inc., and in active management of the company during the period covered by the Complaint in PACA Docket No. D-02-0021").

Respondent's Appeal to the Decision and Order." First, the Agricultural Marketing Service and the Chief contend the Chief ALJ's assessment of a civil penalty, is error.

The Chief ALJ assessed Kleiman & Hochberg, Inc., a $180,000 civil penalty (Initial Decision at 35). While the Chief ALJ found Kleiman & Hochberg, Inc.'s payment of bribes to United States Department of Agriculture inspectors serious violations of the PACA, he found that revocation of Kleiman & Hochberg, Inc.'s PACA license was not warranted because John Thomas paid the bribes to obtain expedited United States Department of Agriculture inspections of perishable agricultural commodities for Kleiman & Hochberg, Inc., rather than to gain a competitive advantage over shippers or growers (Initial Decision at 25).

John Thomas' motivation for the payment of bribes to United States Department of Agriculture produce inspectors in connection with the inspection of perishable agricultural commodities is not relevant to the sanction to be imposed against Kleiman & Hochberg, Inc. A PACA licensee's payment to a United States Department of Agriculture produce inspector to obtain an expedited inspection of perishable agricultural commodities negates, or gives the appearance of negating, the impartiality of the United States Department of Agriculture produce inspector and undermines the confidence produce industry members and consumers place in the quality and condition determinations rendered by the United States Department of Agriculture produce inspector.

Commission merchants, dealers, and brokers have a duty to refrain from paying United States Department of Agriculture produce inspectors in connection with the inspection of perishable agricultural commodities. A PACA licensee's payment of bribes to a United States Department of Agriculture produce inspector, whether the payment is designed to obtain an expedited inspection or to obtain an economic advantage over shippers and growers, undermines the trust produce sellers place in the accuracy of United States Department of Agriculture inspection certificates and the integrity of United States Department of Agriculture produce inspectors.

The record establishes that Kleiman & Hochberg, Inc.'s vice president and holder of 31.6 percent of the outstanding stock of Kleiman & Hochberg, Inc., paid bribes to United States Department of Agriculture produce inspectors for approximately 10 years. Kleiman & Hochberg, Inc.'s violations of the PACA are egregious. In every previous case that has come before me in which a PACA licensee has paid bribes or illegal gratuities to United States Department of Agriculture produce inspectors in connection with the inspection of perishable agricultural commodities in violation of the PACA, I imposed the maximum sanction of either licence revocation or publication of the facts and circumstances of the violations.[16] I find no reason to depart from my normal practice of imposing the maximum sanction in this proceeding. Therefore, I revoke Kleiman & Hochberg, Inc.'s PACA license.

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[16] See note 11.

Second, the Agricultural Marketing Service and the Chief contend the Chief ALJ's finding that Michael H. Hirsch and Barry J. Hirsch were not actively involved in the activities resulting in Kleiman & Hochberg, Inc.'s violations of the PACA, is error.

The United States Department of Agriculture's standard for determining whether a petitioner is actively involved in the activities resulting in a violation of the PACA was first set forth in *In re Michael Norinsberg*, 58 Agric. Dec. 604, 610-11 (1999) (Decision and Order on Remand), as follows:

> The standard is as follows: A petitioner who participates in activities resulting in a violation of the PACA is actively involved in those activities, unless the petitioner demonstrates by a preponderance of the evidence that his or her participation was limited to the performance of ministerial functions only. Thus, if a petitioner demonstrates by a preponderance of the evidence that he or she did not exercise judgment, discretion, or control with respect to the activities that resulted in a violation of the PACA, the petitioner would not be found to have been actively involved in the activities that resulted in a violation of the PACA and would meet the first prong of the responsibly connected test.

I agree with the Chief ALJ that Michael H. Hirsch and Barry J. Hirsch demonstrated by a preponderance of the evidence that they were not

actively involved in the activities resulting in Kleiman & Hochberg, Inc.'s violations of the PACA. In their appeal petition, the Agricultural Marketing Service and the Chief cite numerous portions of the record which establish that Michael H. Hirsch and Barry J. Hirsch were actively involved in the day-to-day management of Kleiman & Hochberg, Inc.; however, there is no evidence that Michael H. Hirsch or Barry J. Hirsch participated in activities resulting in John Thomas' payment of bribes to United States Department of Agriculture produce inspectors. More to the point, Kleiman & Hochberg, Inc., Michael H. Hirsch, and Barry J. Hirsch proved by a preponderance of the evidence that Michael H. Hirsch and Barry J. Hirsch were not actively involved in activities resulting in Kleiman & Hochberg, Inc.'s violations of the PACA.

The Agricultural Marketing Service and the Chief also contend Michael H. Hirsch and Barry J. Hirsch were each actively involved in the activities resulting in Kleiman & Hochberg, Inc.'s violations of the PACA by virtue of the ownership of more than 10 percent of the outstanding stock of Kleiman & Hochberg, Inc. The Agricultural Marketing Service and the Chief essentially urge that I hold that any individual that owns more than 10 percent of the outstanding stock of a corporation *is per se* responsibly connected with that corporation. However, Congress has rejected *the per se* approach urged by the Agricultural Marketing Service and the Chief.

On November 15, 1995, the definition of the term *responsibly connected* in the PACA was

amended by adding a rebuttable presumption standard which explicitly allows an individual who is a holder of more than 10 percent of the outstanding stock of a corporation to rebut his or her status as responsibly connected with the corporation. Specifically, section 12(a) of the Perishable Agricultural Commodities Act Amendments of 1995 amends the definition of the term *responsibly connected* in section 1(b)(9) of the PACA (7 U.S.C. § 499a(b)(9)) by adding a sentence to the definition which reads as follows:

> A person shall not be deemed to be responsibly connected if the person demonstrates by a preponderance of the evidence that the person was not actively involved in the activities resulting in a violation of [the PACA] and that the person either was only nominally a partner, officer, director, or shareholder of a violating licensee or entity subject to license or was not an owner of a violating licensee or entity subject to license which was the alter ego of its owners.

The applicable House of Representatives Report states that purpose of the 1995 amendment to the definition of *responsibly connected* is "to permit individuals, who are responsibly connected to a company in violation of PACA, the opportunity to demonstrate that they were not responsible for the specific violation."[17] The House of Representatives Report also contains the views of

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[17] H.R. Rep. No. 104-207, at 11 (1995), *reprinted in* 1995 U.S.C.C.A.N. 453, 458.

the administration set forth in a letter from the Secretary of Agriculture to the Chairman of the Committee on Agriculture, House of Representatives, which states that the amendment to the definition of *responsibly connected* would "allow individuals an opportunity to demonstrate that they were only nominal officers, directors, or shareholders and that they were uninvolved in the violation."[18] Michael H. Hirsch and Barry J. Hirsch each carried his burden of proof that he was not actively involved in the activities resulting in Kleiman & Hochberg, Inc.'s violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)).

Kleiman & Hochberg, Inc.'s, Michael H. Hirsch's, and Barry J. Hirsch's Appeal Petition

Kleiman & Hochberg, Inc., Michael H. Hirsch, and Barry J. Hirsch raise six issues in "Respondent's and Petitioners' Joint Appeal Petition To the Judicial Officer Pursuant To 7 C.F.R. § 1.145 From the Decision of the Hon. Marc R. Hillson, C.A.L.J., Dated December 3, 2004." First, Kleiman & Hochberg, Inc., Michael H. Hirsch, and Barry J. Hirsch contend Kleiman & Hochberg, Inc., did not violate the PACA because John Thomas did not pay bribes to United States Department of Agriculture produce inspectors, but, instead, was the victim of extortion by a corps of corrupt United States Department of Agriculture employees installed for more than a decade at the Hunts Point Terminal Market.

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[18] H.R. Rep. No. 104-207, at 18-19 (1995), *reprinted in* 1995 U.S.C.C.A.N. 453, 465-66.

As an initial matter, I reject Kleiman & Hochberg, Inc.'s, Michael H. Hirsch's, and Barry J. Hirsch's contention that John Thomas did not pay bribes to United States Department of Agriculture produce inspectors. The record contains substantial evidence that John Thomas paid bribes to United States Department of Agriculture inspectors, including evidence of John Thomas' plea of guilty to bribery of public officials over approximately a 10-year period (CX 8-CX 9). The information to which John Thomas pled guilty states, as follows:

> From in or about 1990 through on or about October 27, 1999, in the Southern District of New York, JOHN THOMAS, the defendant, unlawfully, wilfully, knowingly, directly and indirectly, did corruptly give, offer and promise things of value to public officials, with intent to influence official acts, to wit, JOHN THOMAS, the defendant, made cash payments to United States Department of Agriculture produce inspectors in order to obtain expedited inspections of fresh fruit and vegetables conducted at Kleiman & Hochberg, Inc., Hunts Point Terminal Market, Bronx, New York.
>
> (Title 18, United States Code, Sections 201(b)(1)(A) and 2.)

CX 8 at 2.

Moreover, even if I found that all of John Thomas' payments to United States Department of Agriculture produce inspectors were made as a

result of extortion by United States Department of Agriculture employees (which I do not so find), I would conclude that Kleiman & Hochberg, Inc., violated the PACA. Commission merchants, dealers, and brokers have a duty to refrain from making payments to United States Department of Agriculture produce inspectors in connection with the inspection of perishable agricultural commodities which will or could undermine the trust produce sellers place in the accuracy of United States Department of Agriculture inspection certificates and the integrity of United States Department of Agriculture produce inspectors. A PACA licensee's payment to a United States Department of Agriculture produce inspector, whether a bribe or the result of extortion, undermines the trust produce sellers place in the integrity of the United States Department of Agriculture inspector and the accuracy of the United States Department of Agriculture inspection certificate.[19]

The extortion cited by Kleiman & Hochberg, Inc., Michael H. Hirsch, and Barry J. Hirsch (Tr. 509-11) is not a "reasonable cause," under section 2(4) of the PACA (7 U.S.C. § 499b(4)), for Kleiman & Hochberg, Inc.'s failure to perform the implied duty to refrain from paying United States Department of Agriculture produce inspectors in connection with the inspection of perishable agricultural commodities.

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[19] *In re G &T Terminal Packaging Co.*, 64 Agric. Dec. __, slip op. at 19 (Sept. 8, 2005), *appeal docketed*, No. 05-5634 (2d Cir. Oct. 18, 2005).

Second, Kleiman & Hochberg, Inc., Michael H. Hirsch, and Barry J. Hirsch argue that Kleiman & Hochberg, Inc., did not violate section 2(4) of the PACA (7 U.S.C. § 499b(4)), because John Thomas' payments to United States Department of Agriculture produce inspectors had no effect on Kleiman & Hochberg, Inc.'s produce transactions or Kleiman & Hochberg, Inc.'s produce suppliers. John Thomas testified that his payments of bribes to United States Department of Agriculture produce inspectors were designed only to obtain expedited United States Department of Agriculture inspections of perishable agricultural commodities. Kleiman & Hochberg, Inc., Michael H. Hirsch, and Barry J. Hirsch have consistently argued that no produce supplier was economically disadvantaged by John Thomas' payments to United States Department of Agriculture produce inspectors.

Bribery of a United States Department of Agriculture produce inspector, even if the bribery does not economically disadvantage any produce seller or grower, in and of itself negates, or gives the appearance of negating, the impartiality of the United States Department of Agriculture produce inspector and undermines the confidence that produce industry members and consumers place in quality and condition determinations rendered by the United States Department of Agriculture produce inspector. Commission merchants, dealers, and brokers have a duty to refrain from making payments to United States Department of Agriculture produce inspectors in connection with the inspection of perishable agricultural commodities which will or could undermine the trust produce

sellers place in the accuracy of United States Department of Agriculture inspection certificates and the integrity of United States Department of Agriculture produce inspectors. A PACA licensee's payments to United States Department of Agriculture produce inspectors, even if the payments are only designed to obtain prompt inspection of perishable agricultural commodities, undermines the trust produce sellers place in the accuracy of United States Department of Agriculture inspection certificates and the integrity of United States Department of Agriculture produce inspectors. Therefore, I reject Kleiman & Hochberg, Inc.'s, Michael H. Hirsch's, and Barry J. Hirsch's contention that Kleiman & Hochberg, Inc., did not violate the PACA because no produce supplier was economically disadvantaged as a result of John Thomas' payments to United States Department of Agriculture produce inspectors.

Third, Kleiman & Hochberg, Inc., Michael H. Hirsch, and Barry J. Hirsch contend John Thomas' payments to United States Department of Agriculture produce inspectors were not within the scope of John Thomas' employment with Kleiman & Hochberg, Inc.; therefore, Kleiman & Hochberg, Inc., is not liable for John Thomas' payments to United States Department of Agriculture produce inspectors.

Generally, the factors considered to determine whether conduct of an employee or agent is within the scope of employment are: (1) whether the conduct is of the kind the employee or agent was

hired to perform;[20] (2) whether the conduct occurs during working hours; (3) whether the conduct occurs on the employment premises; and (4) whether the conduct is actuated, at least in part, by a purpose to serve the employer or principal.[21]

The record clearly establishes that John Thomas was within the scope of his employment with Kleiman & Hochberg, Inc., when he paid bribes to United States Department of Agriculture produce inspectors. John Thomas paid bribes to United States Department of Agriculture produce inspectors at Kleiman & Hochberg, Inc.'s place of business, during regular working hours, and in connection with the inspection of perishable agricultural commodities purchased, received, and accepted by Kleiman & Hochberg, Inc. John Thomas was authorized to apply for United States Department of Agriculture inspections of perishable agricultural commodities and the bribes John Thomas paid to United States Department of Agriculture produce inspectors were intended to benefit Kleiman & Hochberg, Inc. (Tr. 345-46, 392-93, 509, 518, 554; CX 10.) Therefore, I reject Kleiman & Hochberg, Inc.'s, Michael H. Hirsch's, and Barry J. Hirsch's contention that John Thomas was not acting within the scope of his employment when he paid United States Department

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[20] Rarely will an employee's or agent's egregious act, such as the payment of a bribe, be conduct of the kind the employee or agent was hired to perform. However, the appropriate inquiry is whether the employee's or agent's egregious act was committed while performing, or in connection with, his or her job responsibilities.

[21] *See generally* Restatement (Second) of Agency § 228 (1958).

of Agriculture produce inspectors.

Fourth, Kleiman & Hochberg, Inc., Michael H. Hirsch, and Barry J. Hirsch contend Kleiman & Hochberg, Inc., is not liable for John Thomas' payments to United States Department of Agriculture produce inspectors because Michael H. Hirsch and Barry J. Hirsch did not know of John Thomas' violations until after his arrest in October 1999.

The relationship between a PACA licensee and persons acting for or employed by the PACA licensee is governed by section 16 of the PACA (7 U.S.C. § 499p) which provides, in construing and enforcing the PACA, the act of any agent, officer, or other person acting for or employed by a commission merchant, dealer, or broker, within the scope of his or her employment or office, shall *in every case* be deemed the act of the commission merchant, dealer, or broker as that of the agent, officer, or other person. Essentially, section 16 of the PACA (7 U.S.C. § 499p) provides an identity of action between a PACA licensee and the PACA licensee's agents and employees.

Kleiman & Hochberg, Inc.'s vice president and holder of 31.6 percent of the outstanding stock of Kleiman & Hochberg, Inc., John Thomas, was acting within the scope of employment when he knowingly and willfully bribed United States Department of Agriculture produce inspectors. Thus, as a matter of law, the knowing and willful violations by John Thomas are deemed to be knowing and willful violations by Kleiman & Hochberg, Inc., even if Kleiman & Hochberg, Inc.'s other officers and part

owners had no actual knowledge of the bribery.[22] The United States Court of Appeals for the Sixth Circuit addressed the issue of identity of action between a corporate PACA licensee and the corporate PACA licensee's employees in a case involving alterations of United States Department of Agriculture inspection certificates by employees of a corporate PACA licensee, as follows:

> MacClaren also claims that the Secretary failed to consider all relevant circumstances before deciding to revoke its license. MacClaren complains that the sanction of license revocation falls exclusively on Gregory MacClaren and Darrell Moccia, while Olds and Gottlob are not subject to any penalty. The sanction, however, falls entirely on MacClaren as a company. Furthermore, because Olds, Gottlob and Johnston were acting within the scope of their employment when they knowingly and willfully violated PACA, their knowing and willful violations are deemed to be knowing and willful violations by MacClaren. Under PACA, "the act, omission, or failure of any agent, officer, or other person acting for or employed by any commission merchant, dealer, or broker, within

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[22] *H.C. MacClaren, Inc. v. United States Dep 't ofAgric.*, 342 F.3d 584, 591 (6th Cir. 2003); *In re Post & Taback, Inc.*, 62 Agric. Dec. 802, 821 (2003), *aff'd*, 123 Fed. Appx. 406 (D.C. Cir. 2005); *In re Geo. A. Heimos Produce Co.*, 62 Agric. Dec. 763, 789-91 (2003), *appeal dismissed*, No. 03-4008 (8th Cir. Aug. 31, 2004); *In re The Produce Place*, 53 Agric. Dec. 1715, 1761-63 (1994); *In re Jacobs on Produce, Inc.* (Decision as to Jacobson Produce, Inc.), 53 Agric. Dec. 728, 754 (1994), *appeal dismissed*, No. 94-4418 (2d Cir. Apr. 16, 1996).

> the scope of his employment or office, shall in every case be deemed the act, omission, or failure of such commission merchant, dealer, or broker as that of such agent, officer, or other person." 7 U.S.C. § 499p. According to the Sixth Circuit, acts are "willful" when "knowingly taken by one subject to the statutory provisions in disregard of the action's legality." *Hodgins v. United States Dep't ofAgric.*, No. 97-3899, 2000 WL 1785733 (6th Cir. Nov. 20, 2000) (quotation omitted). "Actions taken in reckless disregard of statutory provisions may also be considered 'willful.'" *Id.* (quotation and citations omitted). The MacClaren employees admitted to altering USDA inspection certificates and issuing false accounts of sale in knowing disregard of their actions' legality. Accordingly, their willful violations are deemed willful violations by MacClaren.

H.C. MacClaren, Inc. v. United States Dep't ofAgric., 342 F.3d 584, 591 (6th Cir. 2003).

Similarly, *inKoam Produce, Inc. v. DiMare Homestead, Inc.*, 329 F.3d 123 (2d Cir. 2003), the Court found that bribes made by a produce wholesaler's employee to a United States Department of Agriculture produce inspector to induce the inspector to falsify United States Department of Agriculture inspection certificates are, under the PACA, deemed the acts of the produce wholesaler, as follows:

> Lastly, we address Koam's equitable argument that our failure to find in its favor would penalize Koam "simply because USDA sent a corrupt inspector to perform the inspection (a decision over which Koam had no control) at the time that Koam was employing a faithless employee [Friedman] (who played no role in any of the DiMare inspections)." . . . We view the equities differently from Koam, as its argument distorts the facts in at least three ways. . . . Third, Koam's attempt to distance itself from Friedman's criminality fails. Friedman was hardly a "faithless servant," since only Koam, not Friedman, stood to benefit from his bribes. Regardless, under PACA, "the act, omission, or failure of any agent, officer, or other person acting for or employed by any commission merchant, dealer, or broker, within the scope of his employment or office, shall in every case be deemed the act omission, or failure of such commission merchant, dealer, or broker . . . ." 7 U.S.C. § 499p. Thus, Friedman's acts--bribing USDA inspectors--are deemed the acts of Koam.

Koam Produce, Inc. v. DiMare Homestead, Inc., 329 F.3d 123, 129-30 (2d Cir. 2003)

John Thomas, the vice president and holder of 31.6 percent of the outstanding stock of Kleiman & Hochberg, Inc., paid bribes to United States Department of Agriculture produce inspectors. As a matter of law, the violations by Kleiman & Hochberg, Inc.'s officer and part owner are deemed to be violations by Kleiman & Hochberg, Inc., even if

Kleiman & Hochberg, Inc.'s other officers and part owners had no actual knowledge of John Thomas' bribes and would not have condoned those bribes had they known of them.[23] The clear language of section 16 of the PACA (7 U.S.C. § 499p) would be defeated by any other interpretation.

Fifth, Kleiman & Hochberg, Inc., Michael H. Hirsch, and Barry J. Hirsch contend once John Thomas pled guilty to bribing United States Department of Agriculture produce inspectors, Kleiman & Hochberg, Inc.'s liability for John Thomas' bribery became a foregone conclusion and an unconstitutional irrebuttable presumption.

Section 16 of the PACA (7 U.S.C. § 499p) does not create an irrebuttable presumption, as Kleiman & Hochberg, Inc., Michael H. Hirsch, and Barry J. Hirsch assert. Kleiman & Hochberg, Inc., could avoid liability under the PACA for John Thomas' bribery either by showing John Thomas was not acting for or employed by Kleiman & Hochberg, Inc., at the time he bribed United States Department of Agriculture produce inspectors or by showing that John Thomas' bribes were not made within the scope of his employment or office. Therefore, I reject Kleiman & Hochberg, Inc.'s, Michael H. Hirsch's, and Barry J. Hirsch's contention that once John Thomas pled guilty to bribing United States Department of Agriculture produce inspectors, Kleiman & Hochberg, Inc., was irrebuttably presumed to be liable for John Thomas' bribery.

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[23] See note 5.

Sixth, Kleiman & Hochberg, Inc., Michael H. Hirsch, and Barry J. Hirsch contend the imposition of employment sanctions violates Michael H. Hirsch's and Barry J. Hirsch's constitutional right to engage in their chosen occupation.

Individuals found to be responsibly connected with a commission merchant, dealer, or broker, when that commission merchant, dealer, or broker violates section 2 of the PACA (7 U.S.C. § 499b), are subject to employment restrictions under section 8(b) of the PACA (7 U.S.C. § 499h(b)). Under the rational basis test, a statute is presumed to be valid and will be sustained if the statute is rationally related to a legitimate state interest.[24]

The PACA is designed to protect growers and shippers of perishable agricultural commodities from unfair practices by commission merchants, dealers, and brokers.[25] Section 8(b) of the PACA (7 U.S.C. § 499h(b)), which imposes employment restrictions on persons responsibly connected with commission merchants, dealers, and brokers who violate section 2 of the PACA (7 U.S.C. § 499b), is rationally related to the legitimate governmental objective of the protection of producers and shippers of perishable agricultural commodities. The status of being an officer, a director, or a holder of more than 10 percent of the outstanding stock of a commission

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[24] *Schweiker v. Wilson*, 450 U.S. 221, 230 (1981); *United States R.R. Ret. Bd. v. Fritz*, 449 U.S. 166, 174-75 (1980); *Vance v. Bradley*, 440 U.S. 93, 97 (1979); *New Orleans v. Dukes*, 427 U.S. 297, 303 (1976).

[25] H.R. Rep. No. 1041 (1930).

merchant, dealer, or broker that has violated section 2 of the PACA (7 U.S.C. § 499b) forms a sufficient nexus to the violating commission merchant, dealer, or broker so that an officer, a director, or a holder of more than 10 percent of the outstanding stock may be deemed *responsibly connected* and subject to employment sanctions in the PACA.[26] Since the restriction on the employment of *responsibly connected* individuals is rationally related to the purpose of the PACA, section 8(b) of the PACA (7 U.S.C. § 499h(b)) does not unconstitutionally encroach on Michael H. Hirsch's or Barry J. Hirsch's due process rights by arbitrarily interfering with Michael H. Hirsch's or Barry J. Hirsch's chosen occupation.

Contrary to Kleiman & Hochberg, Inc.'s, Michael H. Hirsch's, and Barry J. Hirsch's position, the Fifth Amendment to the Constitution of the United States does not guarantee an unrestricted privilege to engage in a particular occupation.[27] A number of courts have rejected constitutional challenges to employment restrictions in section 8(b)

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[26] *Birkenfield v. United States*, 369 F.2d491, 494-95 (3d Cir. 1966).

[27] *Nebbia v. People of State of New York*, 291 U.S. 502, 527-28 (1934); *Hawkins v. AgriculturalMktg. Serv.*, 10 F.3d 1125, 1133 (5th Cir. 1993); *Zwickv. Freeman*, 373 F.2d 110, 118 (2d Cir.), *cert. denied*, 389 U.S. 835 (1967).

of the PACA (7 U.S.C. § 499h(b)) imposed on individuals found to be responsibly connected with PACA violators.[28]

For the foregoing reasons, the following Order should be issued.

ORDER

1. Kleiman & Hochberg, Inc., has committed willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)). Kleiman & Hochberg, Inc.'s PACA license is revoked, effective 60 days after service of this Order on Kleiman & Hochberg, Inc.

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[28] *Hawkins v. Agricultural Mktg. Serv.*, 10 F.3d 1125 (5th Cir. 1993) (holding the restriction in the PACA upon the employment of persons responsibly connected with a licensee found to have violated the PACA does not violate the due process right to engage in occupations of one's choosing); *George Steinberg & Son, Inc. v. Butz*, 491 F.2d 988 (2d Cir.) (holding section 8(b) of the PACA (7 U.S.C. § 499h(b)), restricting persons determined to be responsibly connected with a PACA licensee who has committed flagrant or repeated violations of the PACA, does not violate the due process right to engage in a chosen occupation), *cert. denied*, 419 U.S. 830 (1974); *Zwick v. Freeman*, 373 F.2d 110 (2d Cir.) (rejecting the petitioner's claim that the employment restrictions in section 8(b) of the PACA (7 U.S.C. § 499h(b)) violate the petitioner's right to earn a livelihood in the common occupations of the community; concluding the employment restrictions in section 8(b) of the PACA (7 U.S.C. § 499h(b)) are reasonably designed to achieve the Congressional purpose of the PACA), *cert. denied*, 389 U.S. 835 (1967); *Birkenfield v. United States*, 369 F.2d 491 (3d Cir. 1966) (stating the exclusion of persons responsibly connected with a PACA licensee who failed to pay a reparation award from employment in the field of marketing perishable agricultural commodities is not unconstitutional).

2. I affirm the Chief's February 12, 2003, determination that Michael H. Hirsch was responsibly connected with Kleiman & Hochberg, Inc., when Kleiman & Hochberg, Inc., willfully, flagrantly, and repeatedly violated section 2(4) of the PACA (7 U.S.C. § 499b(4)). Accordingly, Michael H. Hirsch is subject to the licensing restrictions under section 4(b) of the PACA and the employment restrictions under section 8(b) of the PACA (7 U.S.C. §§ 499d(b), 499h(b)), effective 60 days after service of this Order on Michael H. Hirsch.

3. I affirm the Chief's February 12, 2003, determination that Barry J. Hirsch was responsibly connected with Kleiman & Hochberg, Inc., when Kleiman & Hochberg, Inc., willfully, flagrantly, and repeatedly violated section 2(4) of the PACA (7 U.S.C. § 499b(4)). Accordingly, Barry J. Hirsch is subject to the licensing restrictions under section 4(b) of the PACA and the employment restrictions under section 8(b) of the PACA (7 U.S.C. §§ 499d(b), 499h(b)), effective 60 days after service of this Order on Barry J. Hirsch.

RIGHT TO JUDICIAL REVIEW

Kleiman & Hochberg, Inc., Michael H. Hirsch, and Barry J. Hirsch have the right to seek judicial review of the Order in this Decision and Order in the appropriate United States Court of Appeals in accordance with 28 U.S.C. §§ 2341, 2343-2350. Kleiman & Hochberg, Inc., Michael H. Hirsch, and Barry J. Hirsch must seek judicial review within 60 days after entry of the Order in this Decision and Order.[29] The date of entry of the Order in this Decision and Order is April 5, 2006.

Done at Washington, DC

April 5, 2006

/s/
William G. Jenson
Judicial Officer

[29] See28 U.S.C. § 2344.

ENTERED DECEMBER 3, 2004

UNITED STATES DEPARTMENT OF AGRICULTURE

BEFORE THE SECRETARY OF AGRICULTURE

In re: PACA Docket No. D-02-0021

Kleiman & Hochberg, Inc.,

Respondent

and

Michael H. Hirsch, PACA Docket No. APP-03-0005

Petitioner

and

Barry J. Hirsch, PACA Docket No. APP-03-0006

Petitioner

DECISION

In this decision I find that in PACA Docket No. D-02-0021, Respondent Kleiman & Hochberg, Inc.[1] willfully violated the Perishable Agricultural

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[1] In PACA Docket No. D-02-0021, the USDA's Associate Deputy Administrator, Fruit and Vegetable Service, Agricultural Marketing Service is the Complainant, and Kleiman & Hochberg is the Respondent. In PACA Docket No. APP-03-0005, Michael H. Hirsch is the Petitioner, and in PACA Docket No. APP-03-0006 Barry J. Hirsch is the Petitioner.

Commodities Act (Act), and the regulations thereunder. In particular, I find that Respondent violated section 2(4) of the Act, as a consequence of one of its principals paying bribes to a USDA inspector on 12 occasions. However, because I find these violations were only committed in order to expedite inspections and not to gain an advantage over shippers or others in any of the specific transactions relied upon by Complainant, I am imposing a civil penalty of $180,000 for the violations in lieu of a ninety day license suspension, and I am not revoking Respondent's PACA license. I also find that both Michael H. Hirsch, in PACA Docket No. APP-03005, and Barry J. Hirsch, in PACA Docket No. APP-03-0006, are responsibly connected to Respondent.

Procedural History

On July 16, 2002, Eric Forman, Associate Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, issued a Complaint charging Respondents with "willfully, flagrantly and repeatedly" violating section 2(4) of the Act, and requesting that Respondent's PACA license be revoked. On September 16, 2002, Respondent filed its Answer, denying that it had violated the Act as alleged, and claiming several affirmative defenses. Meanwhile, on February 12, 2003, James R. Frazier, Chief of the PACA Branch of the Agricultural Marketing Services, made determinations that Michael H. Hirsch and Barry J. Hirsch were responsibly connected with Respondent. On March 17, 2003, Michael and Barry Hirsch each filed appeals of those determinations. On April 4,

2003, former Chief Judge James W. Hunt consolidated the disciplinary case against Respondent and the Petitions of the Hirsches for hearing, pursuant to Rule 137(b) of the Rules of Procedure.

The consolidated matter was reassigned to me on July 16, 2003. I conducted a hearing in New York City from March 1 through 4, and from March 15 through 18, 2004. Christopher Young-Morales and Charles Kendall of the U. S. Department of Agriculture's Office of General Counsel represented the Agency, and Mark Mandell and David Gendelman represented Respondent in the disciplinary case and the Petitioners in the responsibly connected matter. The parties subsequently filed initial and reply briefs, and proposed findings of fact and conclusions of law.

Factual Background

What was apparently a long-standing atmosphere of corruption surrounding the Hunts Point Terminal Market in the Bronx became the subject of a fairly extensive federal investigation in 1999. Hunts Point is the largest wholesale produce terminal market in the United States and is the home of many produce houses, including that of Respondent. It handles huge volumes of produce, delivered from points throughout the country and the world. Because produce may have been grown or shipped from many thousands of miles away from New York City, inspections by USDA inspectors play an important role in resolving potential disputes as to the quality of the produce received at Hunts Point.

Produce inspections are normally requested by the receiver of the produce at the market, although the receiver may be acting at the behest of the shipper or another party up or down the line. Approximately 22,000 produce inspections are conducted annually by USDA inspectors at Hunts Point. These inspections are crucial to the successful working of the market at Hunts Point and other produce markets, as the USDA is ostensibly a neutral party who examines the product and verifies its condition, thus allowing for the resolution of potential disputes concerning the condition of the product that arrives at the wholesale market. The inspection certificate allows those parties who no longer have direct access to the produce, such as shippers or growers, to make informed business decisions as to the value of the load, and can result in the renegotiation of terms regarding the sale of the produce.

As a general rule, produce needs to be sold as quickly as possible. This is particularly true with produce that is near ripe or ripe, or where there are defects within the shipment, since the passing of time reduces the value of the produce to the extent that much of it may have to be repackaged or even discarded. Normally, even where an inspection is requested, it is often beneficial to the wholesaler and the shipper to begin selling the produce immediately to get the best price for the produce. Essentially, every hour ripe or defective produce sits around the warehouse costs someone money. However, it is in everyone's best interest that the inspection be conducted as soon as possible, so that an accurate

accounting of the state of the produce is available to settle possible disputes.

The 1999 investigation, known as Operation Forbidden Fruit, apparently conducted primarily by the Federal Bureau of Investigation (FBI) with the significant involvement of USDA's Office of Inspector General (OIG), uncovered a large network of USDA inspectors who were receiving bribes regarding their conduct of inspections, and produce houses that were paying these bribes. At the same time, it was evident that many produce houses were not paying bribes, and not all inspectors were corrupt.

Complainant's principal witness, William Cashin, is a former USDA inspector at Hunts Point who was caught accepting bribes by investigators, and was arrested by the FBI. Tr. 50.[2] To avoid a prison term, Cashin agreed to wear or carry devices allowing him to record, either through audio or visual means, many of the transactions that involved the alleged offering and taking of bribes. Tr. 51, CX 19. During the course of Cashin's participation in Forbidden Fruit, between the time of his agreement with the government to cooperate in March 1999 and his resignation in August 1999, Cashin continued his normal business activities as an inspector. At the conclusion of each business day, he would meet with FBI and OIG agents to discuss the days events,

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[2] "Tr." Refers to the transcript. Complainant's exhibits are marked CX and are sequentially numbered. Respondent's exhibits are marked RX and are sequentially lettered (A-Z, AA-UU). The exhibits for the responsibly connected cases are marked RCMH and RCBH for Michael and Barry Hirsch respectively.

principally which inspections he received bribes for and for how much. Tr. 51-2, 55-6. He turned over the money he received as bribes during each of these meetings.[3] These meetings are recorded on the FBI 302 forms, many of which have been received in evidence at the hearing. CX 10. It is worth noting that apparently the only activity that Cashin was asked about was the identity of the person offering the bribe, the house that person worked for, the type of produce inspected, and the amount of the bribe. Amazingly, particularly in light of the allegations made by Complainant in this case that in exchange for the bribes Cashin "helped" the briber by misreporting some aspect of what he observed, there is no evidence on these forms as to what Cashin did in exchange for the bribes.

Cashin testified that he received bribes on numerous occasions over a number of years from John Thomas, a 31.6 % shareholder and vice-president of Respondent. CX 1, Tr. 41-48, 243. Cashin specifically accounted for 12 inspections where he received bribes from Thomas during the pendency of the Forbidden Fruit investigation. These 12 inspections are cited in the Complaint. Cashin testified that in each of these 12 inspections, he "helped" Respondent by altering one or more aspects of the inspection certificate, but that he had no recollection as to what he did in any specific inspection to "help" Respondent. Tr. 44-5. He testified that he would have "helped" Respondent by

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[3] While it is undisputed that Cashin turned over the bribes paid for the 12 inspections at issue here, there is some dispute as to whether he turned over other bribes paid by Respondent.

overstating the defects, overstating the number of produce containers he inspected, and misstating the temperature of the produce. Tr. 46-50. However, he could not state what he did in any particular instance. Tr. 49.

At the conclusion of Operation Forbidden Fruit, Cashin resigned his position. Tr. 30. John Thomas, Respondent's part owner and vice-president, was indicted on October 21, 1999, for Bribery of a Public Official, a crime for which he eventually pled guilty on October 17, 2001. However, there are significant differences between the initial indictment and the superseding information to which he pled. Initially, Thomas was charged with seven counts of Bribery, based on the payments he made to Cashin in connection with 12 inspections. CX 8A. The indictment alleged that Thomas "made cash payments to a United States Department of Agriculture produce inspector *in order to influence the outcome of inspections* of fresh fruits and vegetables conducted at Kleiman & Hochberg, Inc., Hunts Point Terminal Market, Bronx, New York." (emphasis added). The superseding information to which Thomas pled guilty to one count of bribery alleged that Thomas "made cash payments to a United States Department of Agriculture produce inspector *in order to obtain expedited inspections*." (emphasis added). CX 8. As I discuss below, while I hold Respondent responsible under the Act for the crimes committed by Thomas, the motivation for the crimes, and the impact of the crimes on the shippers and growers involved, are factors I am considering in terms of the appropriate remedy against Respondent.

Thomas freely admitted to paying bribes for the inspections in question. Tr. 509-12, 529. Thomas has been with Respondent for approximately 30 years, and basically runs the night shift. Tr. 509. He testified that in the 1980's he had been visited by USDA inspector Danny Arcery. Tr. 510. This visit was in response to complaints he had made about late produce inspections. Tr. 509-10. He testified that Arcery told him that in order to avoid late inspections, he had to "tip" the inspector $25 to get him "to come quicker rather than purposely later," Tr. 510, 529-32, and that if these instructions were not complied with the produce would be allowed to rot before an inspector would show up. Id., at 511. He testified that while he paid bribes to inspectors and their supervisors, he never asked for "help" and no "help" was ever offered. Tr. 513. He further testified that he never asked for nor received a falsified inspection report, and that the only reason he was paying the inspectors and their supervisors was "to get a quicker inspection as opposed to being purposely delayed." Tr. 518. He further testified that while he was somewhat involved in the sales of the produce, he did not deal with the shipper in settling accounts and had no role in going back to the shipper and adjusting prices. His partners, Barry and Michael Hirsch, handled prices with the shippers. Tr. 535. He also testified that all the bribes came out of his own pocket, and not from company funds and that no one else at Respondent knew he was making these payments. Tr. 519.

I heard a great deal of testimony, presented mostly by Respondent, concerning the significance of the 12 inspection reports that were issued for the

inspections where bribes were paid to Cashin, which were the subject of the initial indictment, and which form the basis of Complainant's case. Through the testimony of Barry and Michael Hirsch, as well as the testimony of many of the shippers who supplied the produce that was inspected, Respondents presented the circumstances behind each of these transactions.

Michael Hirsch testified that Respondent is primarily in the business of buying and selling produce, purchasing from shippers, growers and brokers. Respondent employs up to ninety people, and is a 24-hour a day operation, with the Hirsch brothers principally running the daytime portions of the business. Tr. 573-82. Most contact with suppliers occurs during the daytime. Tr. 576-7. Buying and selling of produce involves a constant give and take, trying to balance the needs of customers with the produce available. Tr. 576-9. Handling of distressed produce, including produce that is rejected by other houses or by wholesale customers, is a part of their business. Tr. 582-3. Frequently, a shipper will call stating that it is bringing in some distressed and/or rejected merchandise with the request that Respondent do the best it can in selling the produce. *Id.* In many cases, an inspection is called in even before an order arrives, if they know they will need an inspection. Michael Hirsch estimated that 5% of the loads they receive are inspected. Tr. 583-4.

The most common arrangement between Respondent and its shippers, particularly with merchandise that they know in advance has some problems is "price-after-sale" or "pas." Under these

circumstances, there is no price fixed upon delivery of the product, although shipping documents frequently have "price ideas" on them. Tr. 578-80. Rather, Respondent records the price it received for each box of produce, factoring in any boxes lost due to repacking or dumping. This account of sale document may also reflect expenses, such as the fee[4] paid the USDA for the inspection. When the entire load is sold or otherwise disposed of, the average net sales price is calculated, at which point Respondent agrees upon a final price for the load with the shipper. Other pricing arrangements are also made, such as consignment, where Respondent would get an agreed upon percentage of whatever the final sale price was. Also, invoices will generally indicate which party pays the freight.

There are also a few more nebulous factors that are used to reach a final price between Respondent and its shippers. Thus, Lawrence Kroman of I. Kunik Company, who has worked with Respondent for approximately 18 years, explained that " . . . the settlement price depends on basically . . . my assessment or our assessment of what that price on that particular file needs to be. Some files the prices are close to what I want, sometimes the prices are more than I want, sometimes the prices are less than what I want. It's based on our relationship, I guess, and our long term goals together, I'd call it." Tr. 962. Other witnesses similarly testified that the final price paid by Respondent for a shipment of produce would be

[4] The legal inspection fee, as opposed to any bribes.

affected by such relationship factors, which frequently affect the final price paid. Tr. 624, 639.

With respect to the individual loads that are the subject of the 12 inspections at issue for which bribes were admittedly paid, Complainant provided undisputed evidence that Thomas bribed Cashin in connection with each of the inspections. However, the only evidence supporting Cashin's claim that in each of these 12 inspections he falsified the inspection reports to "help" Respondent is Cashin's uncorroborated word. Indeed, Cashin was unable to point to a specific instance regarding any of these inspection certificates where he falsified the information. Tr. 49. He only stated that he falsified each report. Even in his daily briefings with the FBI, there is not one single instance where Cashin told the agents of any specific falsification he made in any inspection certificate. In response, Respondent's witnesses testified that in each of the inspections at issue, the inspection report accurately depicted the produce described. Not only was this testified to in great detail by Respondent's principals Michael and Barry Hirsch, but the shippers and suppliers involved in these transactions also testified that the inspection certificates were generally consistent with their perception of the produce, and that since the produce was priced after sale, the inspection certificate was of little moment to the transaction in any event. Tr. 962-3.

For example, one of the cited inspection certificates, for which Cashin was paid, involved a shipment of cantaloupes from I. Kunik Co. This certificate, dated 4/15/99 and signed by Cashin, RX

D, p. 5 (also CX 11, p. 4) indicates that 10% of the produce has sunken areas, and a like proportion suffered from some decay. The sunken area is an indentation caused by age and dehydration. Tr. 804. Barry Hirsch testified that all business with Kunik is done as pas, which was confirmed by Lawrence Kroman, vice president of Kunik. Tr. 797, 961. Although the manifest for the load, RX D, p. 2, listed a price that would appear to be inconsistent with a pas, Kroman confirmed that the $14.25 per box on the manifest was "what I am shooting for as a return on the product" and that it was indeed a pas. Tr. 974. The report of sale sheet, RX D, p. 4, indicates that after the 1064 boxes were fully disposed of, and factoring in the cost of dumping some boxes and the cost of the inspection, the average box was sold by Respondent for $12.10. Respondent paid Kunik $11.75 per box for the entire load, making a "profit" of only 35 cents per box, not even enough to cover its costs when labor is factored in. Kroman admitted that no company in the business "could remain viable at 35 cents a carton," Tr. 978, and went on to explain, much as Barry Hirsch did, that in the course of a relationship lasting decades, sometimes Kroman would ask Hirsch to "work a little close," Tr. 979, and sometimes the margin would be bigger than would be justified by the particular load in question. There was no indication that the inspection certificate was not reflective of the condition of the produce, and the inspection certificate appeared not to be a factor in the settling of the price of the load.

Barry Hirsch was asked, regarding a different load, "Why would you even bother getting an inspection? " He replied, "When the work came in

and it was really bad, every once in a while we'd call to get inspected, just in case the shipper needed the inspection for one of his growers or the shipper called me and asked me to get them inspected, we would get them inspected." Tr. 789. With respect to the Kunik load of cantaloupes that are the subject of RX D, the inspection certificate was never even sent to Kunik, Tr. 808, nor was it discussed with Kroman. Tr. 988-9.

In another shipment, Fisher Bros. Sales, Inc., pertinently contracted with Respondent to sell 479 cartons of South African Bonheur grapes. F. . F. This, too, was pas, as were all transactions between Respondent and Fisher. The grapes were not in the best condition, as Mr. Galo, who was Fisher's Director of Sales at the time, testified that "they'd probably been in the warehouse for a good four or five weeks," and that they were probably cleaning out the cooler at the warehouse. Tr. 1005. Fisher had a target price for the grapes and, when Respondent was able to sell the grapes for a higher price, Fisher received its full target price. Galo testified that the USDA inspection performed by Cashin played no part in Fisher's dealings with Respondent. Tr. 1026.

Similar scenarios were testified to regarding the other transactions that were the subject of the inspection certificates. With respect to each inspection certificate, either Michael or Barry Hirsch, and in most cases a representative of the shipper as well, testified that the inspection certificate accurately reflected the condition of the produce, that the certificate had no impact on the financial aspects of the transaction because the

shipper knew in advance that the produce had some problems, and the final settlement of the load was based on the sales price of the produce more than anything else.

Cashin was also questioned as to his role regarding three other inspections that he stated he conducted, at Respondent's location, but for which he told the FBI investigators he did not receive any illegal payment. These inspections were conducted at Respondent's facility on 4/15/99, and are mentioned in the 302 forms at CX 10, page 4. Cashin testified that he conducted these inspections for "J Scott"—who Cashin said was a buyer who kept an office at Respondent's location. Tr. 148-9. Cashin testified he was never paid bribes for these three inspections. John Thomas, during the course of his testimony, stated that the three inspections Cashin claimed he conducted on 4/15/99 for Scott were in fact conducted for Respondent, and that he paid him a $50 bribe for each inspection. Tr. 516. Subsequently, Helene Traeger, Respondent's assistant office manager, testified that Scott had left Respondent's facilities after an argument in July 1998 and never returned. Tr. 736-8, 740-2. Barry Hirsch, too, confirmed that Scott would not have called for these three inspections, since Scott no longer worked there at the time of the inspections, and that these suppliers were not people Scott worked with even when he was there. Tr. 870-3. Indeed, James Scott himself testified that he left Respondent in mid-July of 1998 and that he had never called for any inspections when he was working at Respondent's facility. Tr. 1047-52.

Carolyn Shelby, a marketing specialist, testified as to her role in the investigation. She basically reviewed a large number of documents, although she discovered that many sales records were lost in a fire at Respondent's facility. Tr. 287. She documented the license records of Respondent, and particularly looked at reparation complaints filed against Respondent. She testified that she did not know what were the outcomes of the reparation complaints against Respondent, nor did she know if the inspections affected the price of the produce at all. Tr. 324-6.

John Koller, a senior marketing specialist with the PACA Branch, testified as Complainant's sanctions witness. Koller testified that by Thomas's paying of bribes to Cashin, Respondent had committed willful, repeated and flagrant violations of PACA. Tr. 350-1. He testified that bribery destroyed the integrity of the inspection process, and constituted a failure by Respondent to perform duties described in Section 2(4) of the Act. He recommended that the license of Respondent be revoked, contending that, due to the seriousness of the violations, civil penalties were not adequate. On cross-examination, Koller admitted that it was generally desirable for inspections to be conducted as close to arrival time of the produce as possible. Tr. 368. He based his sanction recommendation on the commission of bribery, finally concluding that bribing a produce inspector is an unfair practice under the Act, and one for which license revocation was the appropriate sanction. Tr. 349-50.

With respect to whether Michael and Barry Hirsch were responsibly connected to Respondent, Thomas and the Hirsches consistently testified that Thomas acted on his own in paying bribes, and that neither of the brothers was aware that anything illegal was going on until Thomas was arrested. However, there was no dispute that Michael Hirsch was the president and a director of Respondent, as well as a 31.6 % stockholder, and that during the period that is the subject of this case he played a major role in the day to day management of the company, that he worked there from 7:30 a.m. to 6 p.m. every day, that he played a significant role in determining the prices that would be paid for produce, and that his role in the company's operations was far from ministerial or nominal. Similarly, it was undisputed that Barry Hirsch served as treasurer, director and a 31.6 % stockholder, and that he, too, had significant day to day management roles with Respondent, including buying and selling of produce, overseeing warehouse operations, and generally running the daytime operations of the business with his brother. CX 1.

Statutory and Regulatory Background

The Perishable Agricultural Commodities Act governs the conduct of transactions in interstate commerce involving perishable produce. Among other things, it defines and seeks to sanction unfair conduct in the conduct of transactions involving perishables. Section 499b provides:

> It shall be unlawful in or in connection with any transaction in interstate or foreign commerce:
>
> (4) For any commission merchant, dealer, or broker to make, for a fraudulent purpose, any false or misleading statement in connection with any transaction involving any perishable agricultural commodity which is received in interstate or foreign commerce by such commission merchant, or bought or sold, or contracted to be bought, sold, or consigned, in such commerce by such dealer, or the purchase or sale of which in such commerce is negotiated by such broker; or to fail or refuse truly and correctly to account and make full payment promptly in respect of any transaction in any such commodity to the person with whom such transaction is had; or to fail, without reasonable cause, to perform any specification or duty, express or implied, arising out of any undertaking in connection with any such transaction; or to fail to maintain the trust as required under section 499e(c) of this title. However, this paragraph shall not be considered to make the good faith offer, solicitation, payment, or receipt of collateral fees and expenses, in and of itself, unlawful under this chapter.

The penalties for violating the Act may be severe. Thus, upon a finding that a licensed dealer or broker "has violated any of the provisions of section 499b," the Secretary may, "if the violation is flagrant and repeated . . . revoke the license of the offender."

7 U.S.C. §499h(a). The Act also provides for civil penalties as an alternative to license suspension or revocation. "In lieu of suspending or revoking a license . . . the Secretary may assess a civil penalty not to exceed $2,000 for each violative transaction or each day the violation continues . . .giv[ing] due consideration to the size of the business, the number of employees, and the seriousness, nature and amount of the violation." 7 U.S.C. §499h(e).

The Act does not require that Respondent be aware of the specific violations committed by one of its principals or employees in order for the company to be found liable for the violations. Section 16 of the Act, 7 U.S.C. §499p, provides: . . . the act, omission, or failure of any agent, officer, or other person acting for or employed by any commission merchant, dealer, or broker, within the scope of his employment or office, shall in every case be deemed the act, omission, or failure of such commission merchant, dealer, or broker as that of such agent, officer, or other person."

In addition to penalizing the violating dealer or broker, the Act also imposes severe sanctions against any person "responsibly connected" to an establishment that has had its license revoked or suspended. 7 U.S.C. §499h(b). The Act prohibits any licensee under the Act from employing any person who was responsibly connected with any person whose license "has been revoked or is currently suspended" for as long as two years, and then only upon approval of the Secretary. *Id.*

(9) The term "responsibly connected" means affiliated or connected with a commission merchant, dealer, or broker as (A) partner in a partnership, or (B) officer, director, or holder of more than 10 per centum of the outstanding stock of a corporation or association. A person shall not be deemed to be responsibly connected if the person demonstrates by a preponderance of the evidence that the person was not actively involved in the activities resulting in a violation of this chapter and that the person either was only nominally a partner, officer, director, or shareholder of a violating licensee or entity subject to license or was not an owner of a violating licensee or entity subject to license which was the alter ego of its owners.

Findings of Fact

1. Kleiman & Hochberg, Inc. (Respondent) is a New York Corporation whose business and mailing address is 226-233 Hunts Point Terminal Market, Bronx, New York 10474. At all times pertinent to this matter, Respondent was a licensee under the Perishable Agricultural Commodities Act (PACA, or the Act). CX 1.

2. William J. Cashin was employed as a produce inspector at the Hunts Point Terminal Market, New York, office of the United States Department of Agriculture's Agricultural Marketing Service's Fresh Products Branch, from July 1979 through August 1999. Tr. 30.

3. Cashin was one of numerous USDA produce inspectors who participated in a scheme whereby they received bribes for the conduct of produce inspections. On March 23, 1999, Cashin was arrested by agents of the FBI and USDA's OIG. Tr. 50. After his arrest, Cashin entered into a cooperation agreement with the FBI, agreeing to assist the FBI with their investigation into corruption at Hunts Point Market. Tr. 50, CX 19.

4. With the approval of the FBI and the OIG, Cashin continued to perform his duties as a produce inspector in the same fashion as before his arrest. Cashin surreptitiously recorded interactions with individuals at different produce houses using audio and/or video recording devices. At the end of each day, Cashin would give the FBI agents his tapes, turn in any bribes he received, and recount his activities. The FBI agents would prepare a "302" report summarizing what Cashin told them about that day's activities. Tr. 51-52; CX 10.

5. Beginning at least in the late 1980's, and continuing through August 1999, John Thomas paid bribes to William Cashin and other USDA inspectors. Tr. 509-512. The purpose of these bribes was to expedite inspections. *Id.*

6. John Thomas paid Cashin a $50 bribe to conduct each of the 12 inspections referred to in the Complaint.

7. The information reported in each of the inspection certificates referred to in the Complaint appears to be accurate.

8. There is no credible evidence in this record indicating that the bribes paid to Cashin for the 12 inspections referred to in the Complaint were used to gain a bargaining or economic advantage over any of the suppliers of the produce involved in these 12 transactions.

9. During the period in which he paid bribes to Cashin, John Thomas was vice president, a director and a 31.6 % shareholder of Respondent. CX 1.

10. During the period described in paragraph 9, Michael Hirsch was president, a director and a 31.6 % shareholder of Respondent. CX 1.

11. During the period described in paragraph 9, Barry Hirsch was treasurer, a director and a 31.6 % shareholder of Respondent. CX 1.

12. Both Michael and Barry Hirsch were actively involved in the day-to-day management of Respondent's business. There is no evidence that they knew or should have known that Thomas was paying bribes.

Conclusions of Law

1. Payment of bribes to a USDA produce inspector constitutes a failure to perform a duty express or implied in connection with transactions of perishable agricultural commodities in violation of section 2(4) of PACA.

2. The acts of bribery committed by John Thomas constitute violations of section 2(4) of PACA by Respondent.

3. Respondent has committed 12 willful, flagrant and repeated violations of PACA 2(4) by paying bribes to a USDA produce inspector.

4. The appropriate sanction in this case is license suspension for a period of 90 days. Rather than suspend Respondent's license, I impose an alternative civil penalty of $180,000.

5. Michael H. Hirsch is responsibly connected to Respondent.

6. Barry J. Hirsch is responsibly connected to Respondent.

Discussion

I find that one of Respondent's principal owners and officers, John Thomas, paid bribes to William Cashin in each of the 12 instances alleged by Complainant. I further find that bribery of a USDA produce inspector violates the Perishable Agricultural Commodities Act, and that these violations were willful, flagrant and repeated. I find that Respondent is liable for these violations. I further find that the preponderance of the evidence shows that these bribes were not paid to gain any advantage over produce shippers and sellers, but were paid in order to obtain inspections in a timely manner. Therefore, I am not granting Complainant's request to revoke Respondent's PACA license, but I

am instead requiring that Respondent pay a civil penalty of $180,000 in lieu of a 90-day suspension of their license. Since I am not suspending or revoking Respondent's license (unless Respondent elects to serve the suspension rather than pay the penalty), there is no ban on the employment of Michael or Barry Hirsch by any licensee; however, I am making a finding, in the event that my sanction remedy is subsequently reversed, that Michael and Barry Hirsch are each responsibly connected to Respondent.

I. Respondent's bribery of a USDA produce inspector on at least 12 occasions constituted willful, flagrant and repeated violations of the Perishable Agricultural Commodities Act.

A. John Thomas, an officer and major shareholder in Respondent, paid bribes to USDA produce inspector William Cashin on at least 12 occasions.

Both Thomas and Cashin freely acknowledged that Thomas did indeed make $50 payments to Cashin on the 12 occasions alleged in the Complaint. In fact there was no dispute that these 12 occasions were representative of a long-standing practice that went back at least until the 1980's. In fact, Thomas even testified that he paid Cashin an additional $150 for three inspections that were not included in the Complaint even though they occurred on the same day as two other inspections that were included in the Complaint.

It is likewise undisputed that Thomas was vice-president of Respondent at the time the violations alleged in the Complaint were committed, and that he was a 31.6 % shareholder of Respondent.

B. Respondent is liable for the violative acts of Thomas that were committed within the scope of his employment or office.

Section 16 (U.S.C. § 499p) of the Act that states that "in every case" "the act, omission, or failure of any agent, officer or other person acting for or employed by any commission merchant, dealer, or other person acting for or employed by any commission merchant, dealer or broker, within the scope of his employment or office," "shall be deemed the act, omission, or failure" of the employer. Thomas testified that he paid the bribes in order to insure that inspections he ordered were not delayed. Thomas stated that the money used to pay the bribes came out of his own pocket, and there was no paper trial indicating otherwise. He also stated, and the Hirsch brothers confirmed, that he acted without their knowledge or approval. However, the purpose behind the bribes, even as expressed by Thomas, was to benefit Respondent, as the alleged threat of delayed inspections would harm Respondent as an entity. Even though Thomas, as a nearly one-third owner of Respondent, would obviously share in any benefit that Respondent received, it is evident that the bribes paid, whatever their motivation, were designed to benefit Respondent in the conduct of its business.

Thus, in *Post & Tauback, Inc.*, 62 Agric. Dec. 802 (2003), the Judicial Officer held that Section 16 "provides an identity of action between a PACA licensee and the PACA licensee's agents and employees." *Id.*, at 820. As long as Thomas was acting within the scope of his employment, which he clearly was, violations committed by him are deemed to be violations by Respondent.

Even if Michael and Barry Hirsch were unaware of Thomas' actions, the absence of actual knowledge is insufficient to rebut the burden imposed by section 499p. In *Post & Taback, Inc.*, the Judicial Officer unequivocally held that "as a matter of law, . . . violations by [an employee] . . .are . . . violations by Respondent, even if Respondent's officers, directors, and owners had no actual knowledge of the . . . bribery . . . and would not have condoned [it]." *Id.*, at 821. I agree with Complainant's contention that if a company can be held responsible for the acts of an employee, who was not an officer or an owner, even where the company's officers had no knowledge of the acts committed by that employee, then *a fortiori* the company would be responsible for the acts of a person who is both an owner and an officer, whether or not the other officers had actual knowledge of the violative conduct. See Complainant's Initial Brief at 29. The clear and specific language of the Act would be defeated by any other interpretation.

C. Bribery of a USDA produce inspector violates PACA.

Section 2(4) of the PACA makes it unlawful "to fail, without reasonable cause, to perform any specification or duty, express or implied, arising out of any undertaking in connection with any . . . transaction." Agency case law has consistently interpreted this provision to hold that the payment of bribes to a USDA produce inspector is a violation of PACA. Thus, the Judicial Officer held in *Post & Taback:*

> A produce buyer's payment of bribes and unlawful gratuities to a United States Department of Agriculture inspector in connection with produce inspections eliminates, or has the appearance of eliminating, the objectivity and impartiality of the inspector and undermines the trust that produce buyers and sellers have in the integrity of the inspector and the accuracy of the inspector's determinations of the condition and quality of the inspected produce. Moreover, unlawful gratuities and bribes paid to United States Department of Agriculture inspectors threaten the integrity of the entire inspection system and undermine the produce industry's trust in the entire inspection system.

Id., at 825. Bribery, whatever the motive, in and of itself offends the notion of fair competition. The Agency, through the Judicial Officer, and the Courts, have recognized that there is a general

commercial duty to deal fairly which is required of all PACA licensees. *In Sid Goodman and Co., Inc.*, 49 Agric. Dec. 1169, 1183-4 (1990), aff'd, 945 F. 2d 398 (4th Cir. 1991), cert. denied, 503 U.S. 970 (1992), the Judicial Officer cites a line of cases to the effect that "members of the produce industry have an obligation to deal fairly with one another" and goes on to hold that commercial bribery is "unfair" in the context of PACA. Similar holdings, although under distinguishable circumstances, confirm this view of commercial bribery. *See e.g., JSG Trading Corp.*, 58 Agric. Dec. 1041 (1999), aff'd 235 F. 3rd 608 (D.C. Cir. 2001), cert. denied, 122 S. Ct. 458 (2001).

D. The bribery violations committed by Respondent were willful, flagrant and repeated.

While Thomas testified that the motivation for his payments to Cashin was to receive timely inspections, and while he essentially testified that Cashin was part of an extortion or shakedown ring among USDA inspectors, it is apparent that rather than complaining to other government officials, including the FBI, he opted to make the requested payments. There is no evidence, even from Thomas' own testimony, that he viewed the payments as anything more than an efficient means to get his work done. With the long standing nature of these payments, going back upwards of ten years based on Thomas' own testimony, Complainant easily meets its burden of showing that the illegal payments, or bribes, were willful, flagrant and repeated.

A violation is "willful" if "irrespective of evil motive or erroneous advice, a person intentionally does an act prohibited by statute or carelessly disregards the requirements of a statute." *PMD Produce Brokerage Corp.*, 60 Agric. Dec. 780, 789 (2001). Here, Thomas, and therefore Respondent, knew that the payments made to Cashin in the 12 inspections involved in this case, as well as the countless illegal payments over at least the previous decade, were illegal, but essentially decided that they needed to make these payments for the benefit of their business. Clearly, Respondent made a business decision to violate the law, rather than to pursue alternative measures. This constitutes willful conduct.

Likewise, the violations were "flagrant." In *Post & Taback, supra,* the Judicial Officer found, citing the dictionary definition of "flagrant" as covering conduct "conspicuously bad or objectionable" or so bad that it "can neither escape notice nor be condoned," that "payments of unlawful gratuities and bribes to a United States Department of Agriculture inspector in connection with the inspection of perishable agricultural commodities are conspicuously bad and objectionable acts that cannot escape notice or be condoned because . . . they corrupt the United States Department of Agriculture's produce inspection system and disrupt the produce industry." *Id.*, at 829-30. While there are some significant distinctions between the purposes of the bribes in this case versus those in *Post and Taback*, and other pertinent decisions, which I will discuss below in the context of sanctions, the long-standing practice of Respondent bribing Cashin and

other inspectors easily meets the definition of flagrant under applicable case law.

Finally, the violations are obviously repeated. Not only did Thomas admit making illegal payments to Cashin in at least the 12 instances cited by Complainant, he also alleged that he made three other payments to Cashin for inspections that Cashin did not report to the FBI, and admitted that he had made payments for inspections at least since his alleged meeting with Danny Arcery in the late 1980's. Since repeated means more than once, this element has been established by Complainant.

Thus, I hold that Respondent has committed willful, flagrant and repeated violations of section 2(4) of the PACA.

II. The Appropriate Sanction Against Respondent is a Civil Penalty of $180,000.

Although Respondent has committed at least 12 serious violations of the PACA by making illegal payments to Cashin, the sanction of license revocation, as urged by Complainant, is not appropriate under the facts of this case. I base my sanctions decision on a number of factors, including that the preponderance of the evidence establishes that the illegal payments to Cashin in these specific 12 instances were not used to gain a competitive advantage over any shipper or grower and that there is no credible evidence that Thomas made these payments for any reason other than to receive expedited inspections. Looking at the cases cited that support PACA license revocation, I must

conclude that these violations, while serious, warrant a lesser sanction than those cases where bribes were paid in order to take economic advantage of the suppliers of the produce involved.

A. The initial indictment of John Thomas cannot be used to demonstrate that he committed the violations alleged, since he pled to a superseding information, which is dispositive.

Complainant has contended, at some length, that even though John Thomas eventually pled to an information charging him with making illegal payments to a USDA produce inspector in order to receive expedited inspections, I should look at the original indictment in order to determine the acts he really committed. Not surprisingly, Respondent has vigorously contested this approach.

Complainant contended in its opening brief at pages 12-14, 21-22, that the "indictment . . . supports the weight of the evidence, to the effect that Mr. Thomas paid the bribes to Mr. Cashin in order to affect the outcome of produce inspections." While, as I discuss below, I disagree that the weight of the evidence indicates that Thomas was making the payments to influence the outcome of produce inspections, I further disagree with Complainant's contention that the indictment can be considered as evidence that the crimes/violations alleged were committed. While the indictment played a significant role in triggering the PACA Branch's investigation of Respondent, as it should have, I believe it would be inappropriate for me to consider it as an indication

that its allegations are correct, particularly where, as here, it has been superseded by an information to which Thomas pled guilty. Indeed, it appears that the government voluntarily dismissed the initial indictment as part of accepting Thomas' guilty plea on the information in open court.

The limited cases cited by Complainant on the issue provide no help to their position. The cases of *Bousley v. U.S.*, 523 U.S. 614 (1998) and *Peveler v. U.S.*, 269 F. 3d 693 (C.A. 6, 2001), merely hold that when a person elects to vacate a guilty plea which was entered into as a result of plea bargaining, they must make a showing of actual innocence not only for the charges to which they pled, but to the initial charges which the government dropped in order to reach a bargain. The necessary predicate to the application of the holding of these two cases is the existence of an action to vacate a guilty plea. In Thomas' case, he has strongly insisted that his plea was appropriate, and reflected the criminal acts that he actually committed. *Bousley* and *Peveler* are inapposite. With respect to Thomas' motivation for bribing Cashin, I give the initial indictment no weight at all.

B. The preponderance of the evidence establishes that the motivation for the bribes paid by Respondent to Cashin was to prevent delays in inspections, that the 12 inspections that were the subject of the Complaint were not falsified by Cashin, and that Respondent did not use the 12 inspections at issue here to gain any business or commercial advantages vis-à-vis the shippers or growers involved.

The only evidence concerning the motivation for paying bribes to Cashin comes from the testimony of Cashin and Thomas. Unsurprisingly, their testimony conflicts in a number of areas. Thomas stated that he began making payments to USDA produce inspectors for the sole purpose of getting timely inspections beginning when he was told by Arcery that failure to make these payments would result in seriously delayed inspections. He testified that he never asked for "help" on any inspection and knew of no inspection certificates that reflected false information. Although he was indicted for paying bribes to influence the outcome of produce inspections, the only crime of which he stands convicted related to this case is for paying bribes to expedite inspections. In fact, Thomas essentially testified, and counsel argued, that he was really the victim of an organized extortion scheme involving a large number of USDA inspectors, including supervisors and management. Given the number of inspectors indicted and convicted as a result of Operation Forbidden Fruit, and the alleged involvement of supervisors and management, it is not difficult to see how an individual could reach this conclusion.

While Thomas, and thus Respondent, maintained that they never paid bribes to influence inspections, Cashin testified that in each of the 12 inspections he made alterations to the inspection certificate, to "help" Respondent. Unfortunately, Cashin's recollection was such that he could not recall a single specific instance of any alteration he made to any certificate. He testified that he might have changed various items reported on the certificate, including temperature, count, and condition of the produce. While it may be understandable that Cashin would not specifically remember what he wrote on an inspection form nearly five years after the fact, his version of events is further tainted by the absolute lack of mention, in any of the 302 forms compiled by the FBI, of any actions he had taken with regard to the inspections other than actually conducting the inspections and accepting his illegal payment. It is incomprehensible to me how the investigation team, which included members of USDA's OIG, would not have recorded any accounts offered by Cashin of alterations made in the inspection certificates if there was evidence that such alterations were made. Further, Cashin was equipped with both video and audio recording equipment at various times, yet nothing was introduced into evidence which showed that Cashin "helped" Respondent in any way.

Cashin's recollection and/or credibility was greatly reduced by his account of the inspections he said he made for "J Scott." As discussed, *supra*, Cashin claimed that three inspections, for which he told the investigators he had not received illegal payments, were performed for "J Scott." Subsequent

testimony from a number of witnesses, including James Scott himself, demonstrated that Scott had not worked at Respondent's produce house since approximately nine months before these three inspections took place, and that he had nothing to do with these inspections. Thomas testified that he had in fact paid Cashin for these three inspections, and Respondent suggested that Cashin simply pocketed the money himself. This does not demonstrate, as suggested by Respondent, that Cashin's testimony was false in its entirety, but it strongly impacts his credibility. When the most affirmative and emphatic statements offered about the circumstances of inspections on a particular date are so glaringly incorrect, it certainly casts doubt on the statements made by Cashin concerning his alteration of the certificates.

Additionally, Respondent devoted a significant portion of its case to showing that the inspection certificates were in fact reflective of the produce inspected by Cashin. Extensive testimony by Michael and Barry Hirsch, as well as the testimony of Lawrence Kroman of I.J. Kunik, Dino Gallo, former Director of Sales for Fisher, and Peter Silverstein, President of Northeast Trading, Inc., corroborated this assertion of Respondent. Many of the transactions involved in the 12 inspections were of shipments known to be having "problems." Thus, for example, the Bonheur grapes that were the subject of Cashin's April 29, 1999 inspection (RX F, p. 3) were received by Respondent four to five weeks after the close of the season for Bonheur's, and were effectively the result of cleaning out Fisher's storage cooler. That the grapes were in less than ideal

condition is consistent with their age. Similarly, the shipment of grape tomatoes received from NET and inspected by Cashin on May 28, 1999 (RX H, p. 9) had been rejected by the Stew Leonard's chain store. That 13% of the grape tomatoes were reported as defective by Cashin is not surprising; presumably that was the reason for the rejection. As a result, significant repacking had to be done by Respondent. *Id.*, at 6. Further, NET had significant problems with the grower of these tomatoes, and believed that Cashin's inspection results were correct. Tr. 1106-7.

While Respondent did not have testimony from each and every supplier and grower whose produce was inspected by Cashin in these 12 instances, Complainant has offered no testimony, other than Cashin's generic statements that he "helped" Respondent on each inspection, that would allow me to find that, in any of the 12 instances, the produce was not in fact as Cashin described it in the inspection certificate. At the very least, the preponderance of the credible evidence supports the finding that the inspection certificates were generally accurate as to the condition of the produce inspected.

The preponderance of the evidence also supports a finding that Respondent's illegal payments were not used as a means of dealing unfairly with the suppliers of the produce, a factor which I find is important in imposing the appropriate sanction for these violations. Respondent's witnesses uniformly testified that the inspection certificates had no bearing on the prices paid by Respondent for the produce, and that the

ultimate price paid was based on the amount actually received by Respondent from its sales of the produce. Most of the contracts from the inspections at issue were based on price after sale, with a few others on consignment. There was no prearranged price, although there were price suggestions or goals on some of the shipping documents. Following the establishment of the selling price of the produce, which included factoring in produce that had been dumped or repacked, as well as the costs of inspections and, occasionally, freight and other charges, the final price was agreed to. Even here, there was no set formula for establishing prices, as Respondent and its suppliers testified that prices were often finalized based on long-term relationships, on what price was needed to get a return for a particular customer, and many other nebulous factors.

While Respondent's witnesses testified repeatedly that the purpose of the bribes paid by Thomas was to receive expedited inspections and that Respondent did not use the bribes to gain any advantage over the suppliers of the produce, Complainant provided little evidence to contradict this assertion. Thus, Complainant's sanctions witness testified that the bribes "tended to benefit Respondent . . . by Respondent making a bribery payment to a produce inspector to obtain false information for an inspection certificate . . . Respondent would be in a position to use the information that was reported on that inspection that is false to contact the shipper. And by presenting that certificate to the shipper to negotiate or obtain that kind of price adjustments or resolving

disputes with the transaction." Tr. 345. But Complainant was unable to back this assertion up in the face of Respondent's evidence to the contrary.

C. A civil penalty of $180,000 is the appropriate sanction.

At the close of the hearing, I asked both Complainant and Respondent to discuss appropriate sanctions. Tr. 1424-26. In particular, I asked the parties to discuss options available to me that were less onerous than the license revocation urged by Complainant and more onerous than the complete exoneration urged by Respondent. In their briefs, both parties chose to ignore my request and went for the all-or-nothing approach to sanctions. Neither party discussed other options available to me such as suspension of the license for a limited period and/or imposition of civil penalties, even though these options are explicitly available under the statute.

Even though Complainant has not met its burden of showing that the illegal payments made by Thomas were used to induce Cashin to alter inspection certificates, and even though Respondent has demonstrated to my satisfaction that it did not use these payments as part of a scheme to gain a financial advantage in produce transactions over their produce suppliers, this does not exonerate Respondent under the PACA. As discussed, *supra*, USDA case law strongly supports Complainant's contention that bribery of a USDA inspector constitutes a serious violation of the Act.

On the other hand, where the Judicial Officer has ultimately imposed the sanction of revocation, there has generally been a finding that the violator did commit the violation in order to gain a financial advantage, a circumstance not shown by the preponderance of the evidence in this case. Thus, several of the cases cited by Complainant to support revocation indicate that a significant factor leading to the imposition of the most severe sanction was that illegal payments were used to the economic advantage of the payor vis-à-vis the party with whom the payor was transacting business. Thus, in the recent decision of *Post & Taback, supra*, the Judicial Officer affirmed the administrative law judge's finding that payments were made "to influence the outcome of United States Department of Agriculture inspections of fresh fruits and vegetables" and that the false information on the inspection certificates was used "to make false and misleading statements to produce sellers." These factual findings are considerably different than my findings in this case, as I have concluded that Complainant has neither shown that the inspection certificates were inaccurate nor that they were used to deceive or mislead the produce sellers. Similarly, in *Sid Goodman and Co., Inc., supra*, the payments were made to employees of another company to induce them to purchase from Goodman, to the economic advantage of Goodman and the disadvantage of the company of the employees who received the illegal payments. In *Tipco, Inc.*, 50 Agric. Dec. 871 (1991), also cited by Complainant, the decision emphasized, among other things, that "members of the produce industry have an obligation to deal fairly with one another," *Id.*, at 862, a

significant factor in the Judicial Officer's decision to revoke a PACA license. Here, the testimony has been consistent that the Respondent did not deal unfairly with its suppliers, that the suppliers felt that the inspection certificates were accurate and that they had been dealt with fairly by Respondent, and that generally that Respondent has continued to maintain cordial business relationships with these suppliers at least through the date of these hearings.

In imposing a sanction, the Secretary of Agriculture takes "aggravating and mitigating circumstances into account . . . The United States Department of Agriculture's sanction policy has long provided that the sanction is determined by examining all relevant circumstances." *George A. Heimos Produce Company, Inc.*, 62 Agric. Dec. 763, 797 (2003). Respondent committed willful, flagrant and repeated violations by paying bribes to USDA inspectors, which in itself constitutes an extremely serious violation of the PACA. Respondent did not pay these bribes to gain an economic or transactional advantage over its produce suppliers. Thus, rather than imposing the "death penalty" of license revocation, I believe that an appropriate sanction would be a 90day suspension of Respondent's license. Under the alternative assessment provisions of the PACA, Respondent is assessed a penalty of $180,000, based on $2,000 per day for 90 days of continuous violation. In assessing this penalty, I am factoring in the size of Respondent's business, and the number of employees. Looking at exhibits reflecting on Respondent's profitability, including the salaries paid to its principals, e.g., RCMH 6-8, I am satisfied that a penalty of this amount is an adequate

sanction to deter future violations for Respondent and others, without seriously impeding Respondent's ability to continue in business. In *Heimos,* the Judicial Officer determined that, where a suspension was the appropriate sanction, "a civil penalty with an equivalent deterring effect is an appropriate sanction." *Id.*, at 797.

III. Both Barry and Michael Hirsch are Responsibly Connected to Respondent.

Although I am only imposing a civil penalty against Respondent, I am making findings on the two responsibly connected petitions in the event that my sanction imposition is reversed or modified, or if Respondent elects to accept the 90-day license suspension in lieu of the payment of the $180,000 civil penalty.

Barry and Michael Hirsch are each officers, directors and holders of over 31% of the stock in Respondent. Both are intimately involved in the day-to-day activities of the company. Their principal defense to the finding of the PACA Branch that they are not responsibly connected is reliance on the exception for a "person not actively involved in the activities resulting in a violation of this chapter." While there has been no showing that the Hirsches were involved in the violative activities—a fact generally conceded by Complainant—this does not provide the Hirsches any relief. The statute requires not only a showing of noninvolvement in the violative activities, but requires an additional showing that the person "was only nominally a partner, officer, director or shareholder."

The record establishes to a certainty that each of the Hirsches was fully involved in Respondent's business. Indeed, in their Proposed Finding of Facts in the responsibly connected case, the Hirsches ask me to find that "Barry Hirsch was the Treasurer and 32% stockholder of Kleiman & Hochberg, Inc., and in active management of the company during the period covered by the Complaint" (Proposed Finding of Fact 1) and "Michael Hirsch was the President and 32% stockholder of Kleiman & Hochberg, Inc., and in active management of the company during the period covered by the Complaint" (Proposed Finding of Fact 2). These facts refute any possible contention that either of the Hirsches could show that they were not responsibly connected either by showing they were not "actively involved" or that their positions were only "nominal." Under the statutory definition, the fact that the Hirsches might not have been involved in the violative activities does not exonerate them unless they show that they were not actively involved or that their position was purely nominal. The Hirsches simply cannot meet the second part of the statutory test for escaping the responsibly connected label.

CONCLUSION AND ORDER

Respondent has committed willful, repeated, and flagrant violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)). Respondent is assessed a civil penalty of $180,000 in lieu of a 90-day suspension of its license.

The provisions of this order shall become effective on the first day after this decision becomes final. Unless appealed pursuant to the Rules of Practice at 7 C.F.R. § 1.145(a), this decision becomes final without further proceedings 35 days after service as provided in the Rules of Practice, 7 C.F.R. 1.142(c)(4).

Copies of this decision shall be served upon the parties.

Done at Washington, D.C.
this 3rd day of December, 2004

/s

MARC R. HILLSON
Chief Administrative Law Judge

ENTERED NOVEMBER 6, 2007

United States Court of Appeals
For The District of Columbia Circuit

No. 06-1283 **September Term, 2007**

Filed On: November 6, 2007

[1078751]
Kleiman & Hochberg, Inc. and Michael H. Hirsch,
Petitioners

v.

U.S. Department of Agriculture,
Respondent

BEFORE: Tatel, Garland, Brown, Circuit Judges

ORDER

Upon consideration of petitioners' petition for rehearing filed September 28, 2007,

it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY:

Michael C. McGrail
Deputy Clerk

ENTERED NOVEMBER 6, 2007

United States Court of Appeals
For The District of Columbia Circuit

No. 06-1283 **September Term, 2007**

Filed On: November 6, 2007

[1078750]
Kleiman & Hochberg, Inc. and Michael H. Hirsch,
Petitioners

v.

U.S. Department of Agriculture,
Respondent

BEFORE: Ginsburg, Chief Judge, and Sentelle, Henderson, Randolph, Rogers, Tatel, Garland, Brown, Griffith, and Kavanaugh, Circuit Judges

ORDER

Upon consideration of petitioners' petition for rehearing en banc, and the absence of a request by any member of the court for a vote, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY:
Michael C. McGrail
Deputy Clerk

ENTERED MARCH 18, 2004

1287

UNITED STATES DEPARTMENT OF AGRICULTURE

BEFORE THE SECRETARY OF AGRICULTURE

IN RE:	X	PACA DOCKET NO. D-02-0021
	X	HELD MARCH 18, 2 004
KLEIMAN &	X	9:00 A.M.
HOCHBERG,	X	JKJ FEDERAL BUILDING #230
INC.	X	NEW YORK, NEW YORK

VOLUME VIII of VIII

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document speaks for itself.

THE COURT: Well, he already answered it, so I'm going to -- are you going to go beyond that? I mean -- okay, Mr. Hirsch gave his basis, Mr. Koller read it and acknowledges that's what Mr. Hirsch said.

MR. MANDELL: I'd like to direct him to the --

BY MR. MANDELL:

Q. I believe it's the same exhibit number for Barry Hirsch, that would be RCBH Exhibit 3.

A. Yes.

Q. You're aware of that too; right?

A. Yes, I am.

Q. Sir, can you testify under oath that either Barry

or Michael Hirsch had anything to do personally with the actions of John Thomas making payments to inspectors, that led to his arrest?

A. No.

Q. With regard to either of the Hirsch brothers, can you tell us, sir, anything that they could have done to discover what Mr. Thomas was doing?

MR. MORLES: Objection.

MR. KENDALL: Objection. Relevance.

MR. MORLES: Well, it calls for --

THE COURT: No, I can't have you both talk at the same time.

MR. MORLES: Sorry. Relevance, and it calls for rank speculation, I just -- I have no idea what --

THE COURT: Well, I think he's entitled to ask it, actually. I mean, one of the things I'm going to ask you is to deal with the Taback case, you know, in your briefs, which came out very recently, and --

MR. MANDELL: The which case, Your Honor?

THE COURT: Taback, as in Post & Taback decision, and there was a Taback RC decision very recently, I think right after this hearing started, or just before it, which you're going to have to deal with in the briefs.

But, you know, in terms of how things end up

after appeals and all that, I think it makes sense for him to -- to see if he has an answer to this question.

A. What was the question?

BY MR. MANDELL:

Q. Can you tell us, sir, sitting here under oath as the Department's representative in this matter, what, if anything, either of the Hirsch brothers could have done to discover what John Thomas was doing?

MR. MORLES: Objection, Your Honor, and this is the basis, it's the form of the question. I mean, he said, "can you tell us under oath," suggesting that there's some factual answer -- I mean -- this is opinion –

THE COURT: That's a stylistic -- people have

said -- I mean, people are reminded of their being under

oath routinely in terms of --

MR. MORLES: I.suppose that's true, but I mean –

THE COURT: It is true.

MR. MORLES: What, he's going to lie about his

own opinion?

THE COURT: Now you're -- you're getting a little

bit out of hand there. He's entitled -- I already said I'm

going to let him answer this question.

I hope you remember what the question is, I hate

that we have to keep repeating the question after there's an

objection. What could they have done --is there anything

you can think of that those -- that the Hirsches could have

done?

THE WITNESS: I can think of one, is --

BY MR. MANDELL:

Q. Please tell us, sir.

A. Well, one of them could have been working at the

same time as John Thomas, to possibly discover what is going

on.

Q, Sir –

A. Whether they would have or not, I don't know, but

you asked me, so I gave you an answer.

THE COURT: I mean, if they had no clue as to

what was going on, why would they have done that, just –

MR. KENDALL: Judge, if you gave us 30 seconds,

we'll see what we can narrow--

THE COURT: I'll tell you what, I'm going to give

you a one - or two – minute break while you figure things out

and we'll go off the record

(Off the record and recor··ened.)

THE COURT: On the record.

BY MR. MANDELL:

Q. Mr. Koller, you – in both of these RC matters

you chose to put in the bank records, didn't you, signature

cards, that sort of thing?

A. Yes

Q. Bank resolutions?

A. (Nods head.)

Q. And that's because both Barry and Michael had

control over the company's funds; isn't that right?

A. I included those because it showed that they had

authority to do things with the bank.

Q. That's correct, sir. Now, can you identify, sir

any source of funds under the control of either Barry or

Michael Hirsch that were used to make payments to the

inspectors by Mr. Thomas?

A. No

Q. In the context of their control of those banking

-- bank accounts that you were talking about and ability for

checks, did the investigation indicate that there were any discrepancies that would have tipped Mr. Hirsch, either of them, off to a – that payments were being made, in any way?

A. I don't know.

Q. Well, you were here in this courtroom, sir, when Ms. Trager [phonetic] testified yesterday that there were no discrepancies in the petty cash or the cash receipts, except for trivial amounts; isn't that right?

A. Yes

Q. You heard that. Do you have any reason to dispute that?

A. No

Q. Now, Sir, we have – in the event of a finding of

-- that K & H violated the PACA, Barry and Michael Hirsch

will be banned from employment, isn't that right, for a

period of time?

A. They'll be barred, yes.

Q. Mr. Koller, do you have tenure in your position,

are you civil service?

A. Do I have what?

Q. Tenure. Do you understand that term?

A. When you use that – I don't – it's not

terminology relative to my position, so I don't know.

Q. You've been working for the United States

government for, what 17, 18 years?

you answer it, if you know the answer.

A. Over what period of time, I'm not sure --

BY MR. MANDELL:

Q. Pick any period of time you like, sir.

A. I could say there's more no-pay allegation type

actions, but --

(Pause.)

Q. That result in license revocations.

A. Actually, I really don't know.

Q. There is no provision, however, in the PACA to

make the owners of a company, corporation, personally liable

for the debts of that corporation, is there?

MR. KENDALL: Objection. Of all the things that

speak for themselves, the statute clearly speaks for itself.

THE COURT: Yeah, I think we're -- I think you're really pushing it a little bit beyond the limits, Mr. Mandell

MR. MANDELL: Okay, Judge, I'll move on.

BY MR. MANDELL:

Q. I asked you-, sir, if there's anything that the Hirsch brothers could have done to discover. You remember that?

A. Yes.

Q. Now I'm going to ask you if there was anything, in the Department's position, that they should have done to

discover or prevent -- you can take either one - Mr. Thomas's actions?

A. That's not a provision of the Act, as far as what they should have done.

Q. Aren't they required to run the company in conformity with the Act?

A. Well, yes.

Q. What should they have done --

A. The Act doesn't spell out specifically what they should have done. It says that they need to, you know, perform according to the Act.

Q. Well, do I understand it, then, that there's nothing that they should have done?

A. I didn't say that.

Q. I'm missing something here, sir. You can't tell us anything in particular-that they should have done. Am I right?

MR. KENDALL: Objection, asked and answered.

THE COURT: I think he's -- I think I'll sustain that one.

MR. MANDELL: Okay.

BY MR. MANDELL:

Q. We were talking about notice, remember that, with regard to the amended letters, due-process rights to a hearing and such?